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IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1998

PEDRO LEONARDO MASCHERONI,

Petitioner

v.

REGENTS OF THE UNIVERSITY OF CALIFORNIA, ET AL.

Respondents

PETITION FOR WRIT OF CERTIORARI TO THE COURT OF APPEAL FOR THE STATE OF CALIFORNIA, FIRST APPELLATE DISTRICT

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36 pp

QUESTIONS PRESENTED

1. Has a former public employee whose employment and security clearance have been terminated as a result of false accusations been denied procedural due process in the form of a hearing and meaningful access to judicial review and remedies where his state court wrongful termination suit is stayed at the outset and on expiration of the stay dismissed on statute of limitation grounds despite (i) prior rulings in the case that the stay would not prejudice him and (ii) an incorrect representation by Respondents on which the stay was based, (iii) on which rulings and representation Petitioner detrimentally relied?

2. Could the state court first stay the case and later ignore or reverse its own and appellate earlier rulings in the case that Petitioner would not be prejudiced by the stay and nevertheless dismiss the case on statute of limitation grounds without having denied such procedural due process to Petitioner?

3. Does a state court's refusal either to follow the law of the case or estop Respondents from asserting the statute of limitations defense deny Petitioner such procedural due process?

4. May a state employee's employment be terminated for exercise of his First Amendment rights?

5. May a state employee's employment be terminated without judicial review?

6. May a state employee's employment be terminated on the basis of false testimony?

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IN THE SUPREME COURT
OF THE UNITED STATES
OCTOBER TERM, 1998

PEDRO LEONARDO MASCHERONI, PETITIONER

v.

REGENTS OF THE UNIVERSITY OF CALIFORNIA

PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEAL OF THE STATE OF CALIFORNIA FIRST APPELLATE DISTRICT

Petitioner Pedro Leonardo Mascheroni Ph D respectfully petitions for a writ of certiorari to review the decision of the Court of Appeal of the State of California affirming a decision of the Superior Court sustaining without leave to amend a complaint and petition for writ of administrative mandate. The Regents of the University of California managed the Los Alamos National Laboratory (LANL) under a contract with the United States Department of Energy. The Regents hired Dr Mascheroni in 1979 and discharged him in 1987. Dr Mascheroni contended that his discharge was in retaliation for exercise of his rights of freedom of speech and in retaliation for whistle blowing. A hearing officer (Appendix V) and the Director of Los Alamos National Laboratory (Appendix U) upheld the termination. William A Risley, Security Officer, Department of Energy, Los Alamos Area Office in a Special Report to the Inspector General subsequently found that "Thus the LANL used false reasons to RIF Mascheroni." Appendix T-87.

OPINIONS BELOW

Dr Mascheroni challenged his discharge by action filed in California Superior Court on January 24 1991. The Regents moved to stay the California action on the Regents' representation that New Mexico was a more convenient forum. The California Superior Court granted the motion on May 29 1991. Appendix E. The California Court of Appeal affirmed. Appendix D. Motions, appeals and writs to lift the stay were denied in 1991, 1994 and 1995 by the California Superior Court, Court of Appeal and Supreme Court. Appendices G, I and J.

Dr Mascheroni filed actions in New Mexico federal and state courts. The Regents moved to dismiss the New Mexico actions under statutes of limitations. These motions were granted. Appendices H, K, L, M and N.

After the New Mexico actions by Dr Mascheroni were dismissed, the California Superior Court on December 23 1996 lifted its stay . (Appendix C). Dr Mascheroni filed a first amended complaint and petition for writ of administrative mandate. The Regents moved and the trial court dismissed on the grounds that the petition for writ of administrative mandate was filed too late, that California limitations had not been stayed by the California 1991 stay order or the actions filed in New Mexico, and that Dr Mascheroni's actions for damages had been filed prematurely because he had not first obtained judgment on a petition for writ of administrative mandate. Appendix B.

The California Court of Appeal sustained the dismissal. Appendix A. The California Supreme Court denied review. Appendix F.

BASIS FOR JURISDICTION

This Court's jurisdiction over this case is based on Section 1257(a) of Title 28 of the United States Code. The judgment of the Court of Appeal of the State of California, First Appellate District, Division Four was entered on March 31 1998; that Court's order denying rehearing was entered on April 27 1998 and the order denying the Petition for Review to the Supreme Court of California was entered on June 17 1998. The Petition was therefore timely presented pursuant to Supreme Court Rules 13.1 and 30.1. The Clerk returned the petition by letter of September 23 1998 for revision to comply with Rules 14.1(a) and 14.1(i). This revised Petition is timely under Rule 14.5.

CONSTITUTIONAL PROVISIONS

Amendment 1: Congress shall make no law ... abridging the freedom of speech ....

Amendment 5: No person shall ... nor be deprived of life, liberty or property without due process of law.

Amendment 14: * * * No State shall make or enforce any law which shall abridge the privileges of immunities of citizens of the United States nor shall any State deprive any person of life, liberty or property, without due process of law ....

STATEMENT OF THE CASE

Facts.

Because this is an appeal from a dismissal on demurrer, all well-pleaded facts must be deemed true. *Zinermon v. Burch*,

494 U.S. 113, 125 (1990); *Blank v. Kirwan*, 39 Cal.3d 311, 318 (1985).

Petitioner, who holds a doctorate in physics from the University of California at Berkeley, was employed by the University in 1979 to do theoretical physics at the Los Alamos National Laboratory ("LANL") in New Mexico which it managed for the U.S. Department of Energy ("DOE"). He worked on a research program, for which funds were specifically appropriated by Congress and for which he had received appropriate security clearance, for the development of a carbon dioxide laser ("CO_2") intended to generate, confine and thereby make practical use of energy produced in atomic fusion reactions. CO_2 funding was diverted by other LANL physicists including Dr Mascheroni's superiors to development of a krypton fluoride target shooter laser ("KrF") proposed by William Mead, assistant leader of Petitioner's working group. Petitioner was critical of KrF and advocated development of a pulsed hydrogen fluoride laser ("HF") instead.

Dr Mascheroni's Group Leader Douglas Wilson and Division Leader Michael Henderson told Petitioner to keep quiet about the HF laser and to work on projects other than Dr Mascheroni's proposed HF laser. Dr Mascheroni in fact worked on the assigned other projects.

Pursuant to authority from and direction of Deputy Laboratory Director John Birely, Petitioner nevertheless continued to present his opinions in various forums which included presentations at LANL, at scientific meetings of the American Physical Society, at Sandia Laboratory and elsewhere that (i) KrF would not work (it has since been abandoned at LANL upon recommendation by the National Academy of Sciences (NAS)), (ii) even if the KrF did work it would cost

twenty times too much to be affordable and (iii) an HF laser could produce fusion energy at least 20 times cheaper than KrF so that electric power could be attained at an affordable price.

In December 1986 LANL Associate Director John Browne appointed a peer review panel of about ten scientists, chaired by Dr Greg Canavan, a former Director of the DOE Office of Inertial Confinement Fusion, to review Petitioner's HF proposal. Dr Canavan was also one of the key scientists who had initiated the KrF studies and diverted the CO_2 funding. The panel consisted mainly of managers and scientists supportive of the KrF effort, including Mead. The extensive competitive review of the HF technology, which included consideration of several other technologies, was done with full security clearance of all participants, including Petitioner. Petitioner's critique was determined to be scientifically valid, and on January 20 1987 the panel decided to recommend HF. The panel noted that the cost of the HF technology would be only about 5% of the cost of CO_2 or KrF.

In January 1987 X-Division Leader Henderson reported that LANL would engage in a reduction in force ("RIF"). Mascheroni's new Deputy Group Leader William Mead had brought the KrF proposal to LANL, and his Group Leader (Wilson) had ordered Mascheroni to keep quiet about his objections to KrF and the scientific superiority of an HF laser. Mead and Wilson made statements in the RIF narrative known by them to be false (that Mascheroni was incompetent as a scientist) for the purpose of terminating Mascheroni from LANL's Group X-1.

On February 4 1987 LANL gave Petitioner notice of termination from inertial confinement fusion research effective

April 10 1987.[1]

For good measure on April 21 1987 Wilson and LANL management falsely charged Dr Mascheroni with being a security risk. Wilson falsely implied that Petitioner was a spy for Argentina, his native country, and made other false charges of infraction of security rules. Wilson also conveyed the false information by written memorandum to Brent Boyack, Petitioner's supervisor in his demoted job.

As a result, DOE suspended Petitioner's security clearance two weeks after he briefed a National Academy of Sciences member and the director of the DOE Office of Inertial Fusion. This suspension further prevented Dr. Mascheroni from bringing the case for HF laser technology to the DOE's attention at the executive meeting in Los Alamos to discuss the HF recommendation.

The DOE suspended Dr Mascheroni's security clearance without conducting the hearing required by DOE guidelines.

William A Risley, Operational Security Officer, DOE/ Los Alamos Area Office thereafter conducted an investigation of the security related charges against Petitioner and filed a Special Report to the Inspector General of DOE, dated November 21 1991, which concluded:

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1. Dr Mascheroni's previous deputy division leader Dr Thomas Hirons found a job for Mascheroni as an entry level (college graduate) computer programmer in N Division but Dr Mascheroni was soon terminated from that make-work assignment.

> Thus LANL used false reasons to RIF Mascheroni. This was discovered in Laboratory grievance hearings, where the hearing officer recommended deletion of all the RIF-related memos about Mascheroni. Wilson and Henderson [Mascheroni's supervisors] brought trumped-up security issues against Mascheroni and put false information into the security system. After he was RIFed, they pursued security through OS and the LANL OS-Division Leader put security flags on Mascheroni's file that would bring about the suspension of his access. Because of the nature of this false, derogatory information from LANL management, DOE decided to suspend Mascheroni's access without following guidelines. Appendix T-87, quoted in First Amended Complaint ¶ 26.

Far from being contested, the foregoing facts are not only taken as true as a matter of law but are entirely uncontested: Hearing Officer Feller found that the Wilson and Mead statements about Dr Mascheroni were false (Appendix V-43 to V-49); and the allegations of paragraphs 26 and 27 of the First Amended Complaint are taken directly from Security Officer Risley's Special Report to the Inspector General of the Department of Energy dated November 21 1991. Appendix T-87 -T-89. The admitted facts that the charges against Dr Mascheroni were perjured hardly adds to the equity of the defendants' case.[2]

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2. *Mooney v. Holohan*, 294 U.S. 103 at 112 (1935) holds that due process prohibits "deliberate deception of court and

All of the attempts by Dr Mascheroni to obtain judicial review of his termination for exercise of his First Amendment right of freedom of speech have been denied.

Why Review Should Be Granted

The Supreme Court should decide whether it comports with due process of law for a state to deny all judicial review of a decision to terminate a public employee for exercise of his constitutional rights of freedom of speech by adopting rules of procedure which first stay the petitioner's action and then dismiss petitioner's action for failing to take action in the very same court while the stay remains in effect.

Claims below under the United States Constitution.

Dr Mascheroni first asserted his federal constitutional rights in Hearing Brief filed before the University grievance hearing officer and dated July 5 1988 stating:

> Termination of an employee for expressing his opinions violates both public policy of United States and California law.
> * * * * *
> In Bekiaris v. Board of Education, 6 Cal.3d 575 at 590 (1972) the Supreme Court held that

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jury" by a prosecution's knowing use of perjured testimony. No reason appears why the use of perjured testimony to sustain a termination of a public employee is any less a denial of due process of law in a civil case than it would be in a criminal case.

a:

> dismissed employee is entitled to **an independent judicial determination** of the ultimate question whether, in light of those facts, he was dismissed not for the reasons stated in the accusation but rather because of official dissatisfaction with exercise of his constitutional rights. (Page 36)(Emphasis added).

The Hearing Officer denied Dr Mascheroni's grievance on November 1990. On January 24 1991 Dr Mascheroni filed a wrongful termination complaint against the University in Alameda County Superior Court. LANL Director Hecker affirmed the decision of the Hearing Officer by letter dated February 8 1991. Shortly thereafter the University, having neither answered nor demurred, moved to stay Dr Mascheroni's complaint on the ground that New Mexico was a more convenient forum. In memorandum filed April 16 1991 in California Superior Court in opposition to motion to transfer the action to New Mexico Dr Mascheroni again asserted his rights under public policy designed

> to protect the employee's freedom to exercise **first amendment rights**." The policy was designed to "protect the employee's freedom to exercise first amendment rights ... See, Bekiaris v. Board of Education (1972) 6 Cal.3d 575, 590 ('dismissed employee is entitled to an independent judicial termination of the ultimate question whether ... he was

> dismissed ... because of official dissatisfaction with his exercise of constitutional right;) * * * (Page 11).

Dr Mascheroni's memorandum filed July 1 1991 in California Superior Court in support of motion to vacate the California stay cited *Gulf Oil Corporation v. Gilbert*, 330 U.S. 501, 506-507 (1947):

> In all cases in which the doctrine of forum non conveniens comes into play, it presupposes at least two forums in which the defendant is amenable to process * * * (Page 4)

Dr Mascheroni's same memorandum continues:

> It is a universally recognized rule that "He who seeks equity must do equity." Warsaw v. Chicago Metallic Ceilings, Inc. (1984) 15 Cal.3d 564, 576 (Citations omitted). As the United States Supreme Court stated in Koster v. Lumbermens Mutual Casualty Co. (1946) 330 U.S. 518, 522:
>
> > [In forum non conveniens actions], as in all other petitions for equitable relief, he who seeks equity must do equity, and the court will be alert to see that the peculiar remedial process is in no way abused.(Pages 5-6).

The California court stayed Dr Mascheroni's

California action from May 29 1991 until December 18 1996, by which time it had become clear that no New Mexico forum was suitable. On December 18 1996 the California stay was lifted and on December 30 1996 Dr Mascheroni amended his complaint to add a petition for writ of administrative mandate. The University demurred on February 18 1997.

Dr Mascheroni in his Memorandum of Points and Authorities in Support of Motion to Augment Record, for Jury Trial and for Writ of Administrative Mandate filed April 1 1997 again quoted *Bekiaris v. Board of Education*, 8 Cal.3d 575 (1972) that he was entitled to an independent judicial determination whether he had been discharged in retaliation for exercise of his First Amendment constitutional rights:

> We think that in these circumstances such rule is indispensable to the integrity of the review process; otherwise the administrative board simply by its own findings can absolve itself of any action in derogation of constitutional rights and insulate such exculpation from any further scrutiny. 8 Cal.3d 575 at 592-593 (1972) (Page 11).

In his reply filed April 14 1997 to the Regents, Dr Mascheroni points out that denial of independent judicial review:

> is entirely inconsistent with *Bekiaris v Board of Education* (1972) 6 Cal3d 575 . . . and would also be unconstitutional under the

federal Constitution. *Yick Wo v Hopkins* (1886) 118 US 356 at 370 declared:

> When we consider the nature and theory of our institutions of government, the principles upon which they are supposed to rest and review the history of their development, we are constrained to concluded that they do not mean to leave room for the play and action of purely personal and arbitrary power. * * * For, the very idea that one man may be compelled to hold his life, or the means of living, or any material right essential to the enjoyment of life, at the mere will of another, seems to be intolerable in any country where freedom prevails, as being the essence of slavery itself.

Bakke v. Regents of the University of California (1976) 18 Cal3d 34 at 38 and in 438 US 265 at 293-294 cite and follow *Yick Wo v Hopkins*.

> Another problem of constitutional dimension is raised: Unless the court grants independent review final decision regarding Dr Mascheroni's employment has been left to persons who have a direct financial interest: * * *
>
> The actions by persons with a direct

> financial interest in the decision violated fundamental due process. *Tumey v Ohio* (1927) 273 US 510 at 523 held that it violates the Fourteenth Amendment to subject [a person's] liberty or property to the judgment of a court the judge of which has a direct, personal, substantial, pecuniary interest in reaching a conclusion against him in his case. (Memorandum pp 2-3).

The trial court sustained the University's demurrer on April 17 1997 without leave to amend. Dr Mascheroni appealed. In his brief filed with the California Court of Appeal on December 1 1997 Dr Mascheroni again cited *Bekiaris v. Board of Educ* (1972) 6 Cal.3d 575, 587 that

> the dismissed employee is entitled to an **independent judicial determination** of the ultimate question of whether, in light of [the] facts, he was dismissed not for the reasons stated in the accusation but rather because of official dissatisfaction with his exercise of constitutional rights.

Id at 590 (emphasis added). The California Court of Appeal denied Dr Mascheroni's appeal.

In his petition for review by the California Supreme Court filed May 8 1998 Dr Mascheroni again asserted:

> **4. The Supreme Court should grant the petition for hearing to avoid creating an**

unnecessary question whether California's procedure denies due process of law.

The United States and California constitutions provide that no person may be deprived of life, liberty or property without due process of law. US Constitution Amendment 5; California Constitution Article 1 §7. Due process of law includes independent judicial review of Administrative action. *Bekiaris v Board of Educ* (1972) 6 Cal 3d 575, 587 held that even where an administrative decision will be upheld if supported by substantial evidence

> the [petitioner for writ of administrative mandamus] is entitled to an *independent judicial determination* of the ultimate question whether, in light of [the] facts, he was dismissed not for the reasons stated in the accusation but rather because of official dissatisfaction with his exercise of *constitutional rights*. [Emphasis added.]

In *Crowell v Benson* (1932) 285 US 22 Chief Justice Hughes declared:

> In cases brought to enforce constitutional rights, the judicial power of the United States necessarily extends to <u>independent determination</u>

> of all questions, both of fact and law, necessary to performance of that supreme function. The case of confiscation is illustrative, the ultimate conclusion almost invariably depending upon the decisions of questions of fact. This court has held the owner to be entitled to "a fair opportunity for submitting that issue to a judicial tribunal for determination upon its own independent judgment as to both law and facts." *Ohio Valley Water Co. v Ben Avon*, 253 U.S. 387, 64 L. ed. 908.... [Emphasis added. Further citations omitted].

285 US at 60.

> In the present instance, the argument that the Congress has constituted the deputy commissioner a fact-finding tribunal is unavailing, as the contention makes the untenable assumption that the constitutional courts may be deprived in all cases of the determination of facts upon evidence even though a constitutional right may be involved. * * * But when fundamental rights are in question, this Court has repeatedly emphasized the difference in security of judicial over administrative action. [Citation

omitted].

285 US at 60-61.

Dr. Mascheroni's petition also cited *St Joseph Stock Yards Co v. United States* (1936) 298 US 38 at page 52 stating:

> Legislative agencies, with varying qualifications, work in a field peculiarly exposed to political demands. Some may be expert and impartial, others subservient. It is not difficult for them to observe the requirements of law in giving a hearing and receiving evidence. But to say that their findings of fact may be made conclusive where constitutional rights of liberty and property are involved, although the evidence clearly establishes that the findings are wrong and constitutional rights have been invaded, is to place those rights at the mercy of administrative officials and seriously to impair the security inherent in our judicial safeguards. That prospect, with our multiplication of administrative agencies, is not one to be lightly regarded. [Emphasis added].

Dr. Mascheroni's petition for review in the California Supreme Court concluded:

> The decision of the Court of Appeal below denies due process to plaintiff Mascheroni because it denies him any judicial

review whatever, even though he filed his complaint in January 1991 and immediately filed his first amended complaint when the stay imposed by the trial court was lifted.

The trial court sustained the University's demurrer on the ground that Dr Mascheroni's petition for writ of administrative mandate was barred by the statute of limitation. Appendix B. The trial court's decision was error for four reasons: (1) a petition for writ of administrative mandate may be joined with causes of action for damages in the same action and commencement of the action relates back to the filing of the original complaint, (2) the trial court's stay prevented Dr Mascheroni from initiating a separate judicial proceeding on the same facts and calling it a petition for writ of administrative mandate instead of a complaint, (3) the trial court's stay of Dr Mascheroni's judicial action in California tolled limitations on Dr Mascheroni's petition for writ of administrative mandate, and (4) Dr Mascheroni's January 24 1991 filing of a complaint tolled limitations on his petition for writ of administrative mandate.

The California District Court of Appeal affirmed the trial court. Appendix A. The California Supreme Court denied review. Appendix F.

SUMMARY OF ARGUMENT

The foregoing facts show that the rulings of the California courts have totally denied Petitioner's due process right to reasonable access to its courts to remedy the loss of his property and First Amendment rights. California has caused

this deplorable result by staying Petitioner's wrongful termination suit, compelling him to seek to litigate it elsewhere and then, in disregard of its own authorities to the contrary, dismissed his case because he complied with its orders.

ARGUMENT

1. The Due Process clause protects petitioner's access to the California courts to attempt to protect his Fourteenth Amendment property rights and First Amendment rights of freedom of speech.

As Justice Jackson, writing for the Court in *Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306 at 313 (1950), observed:

> Many controversies have raged about the cryptic and abstract words of the Due Process Clause but there can be no doubt that at a minimum they require that deprivation of life, liberty or property by adjudication be preceded by notice and opportunity for hearing appropriate to the nature of the case...

Logan v. Zimmerman Brush Co., et al., 455 U.S. 422 at 429 (1982) declared:

> .....The Court traditionally has held the Due Process Clauses protect civil litigants who seek recourse in the courts, either as

> defendants hoping to protect their property or as Plaintiffs attempting to redress grievances. In *Societe Internationale v. Rogers*, 357 U.S. 197 (1958), for example–where a plaintiff's claim had been dismissed for failure to comply with a trial court's order–the Court read the "property" component of the Fifth Amendment's Due Process Clause to impose 'constitutional limitations upon the power of courts, even in aid of their own valid processes, to dismiss an action without affording a party the opportunity for a hearing on the merits of his cause.' Id., at 209. See also *Hammond Packing Co. v. Arkansas*, 212 U.S. 322, 349-351 (1909) (power to enter default judgment); *Hovey v. Elliott*, 167 U.S. 409 (1897) (same); *Windsor v. McVeigh*, 93 U.S. 274 (1876) (same). Cf. *Wolff v. McDonnell*, 418 U.S. 539, 558 (1974). Similarly, the Fourteenth Amendment's Due Process Clause has been interpreted as preventing the States from denying potential litigants use of established adjudicatory procedures, when such an action would be 'the equivalent of denying them an opportunity to be heard upon their claimed [rights]. *Boddie v. Connecticut*, 401 U.S. 371, 380 (1971).....

Justice Blackmun continued his opinion in *Logan* by stating:

> As our decisions have emphasized time

> and again, the Due Process Clause grants the aggrieved party the opportunity to present his case and have its merits fairly judged. Thus it has become a truism that 'some form of hearing' is required before the owner is finally deprived of a protected property interest. *Board of Regents v. Roth*, 408 U.S., at 570-571... And that is why the Court has stressed that, when a 'statutory scheme makes liability an important factor in the State's determination..., the State may not, consistent with due process, eliminate consideration of that factor in its prior hearing.' *Bell v. Burson*, 402 U.S. , at 541. To put it as plainly as possible, the State may not finally destroy a property interest without first giving the putative owner an opportunity to present his claim of entitlement. See id., at 542.

455 U.S. at 433-434.

Logan is ample authority for the proposition that termination of Petitioner's employment on the basis of false statements and in retaliation for his exercise of his First Amendment right to express his critical opinions of LANL's laser development programs was unconstitutional in the entire absence of <u>any</u> effective judicial process. But these themes have an elegant and aged lineage which can only be burnished by a brief chorus:

In *Crowell v. Benson*, 285 U.S. 22 (1932) Chief Justice Hughes declared:

> In cases brought to enforce constitutional rights, the judicial power of the United States necessarily extends to **independent determination of all questions, both of fact and law, necessary to performance of that supreme function.** The case of confiscation is illustrative, the ultimate conclusion almost invariably depending upon the decisions of questions of fact. This court has held the owner to be entitled to "a fair opportunity for submitting that issue to a judicial tribunal for determination upon its own independent judgment as to both law and facts." *Ohio Valley Water Co. v. Ben Avon*, 253 U.S. 387.
>
> In the present instance, the argument that the Congress has constituted the deputy commissioner a fact-finding tribunal is unavailing, as **the contention makes the untenable assumption that the constitutional courts may be deprived in all cases of the determination of facts upon evidence even though a constitutional right may be involved. * * * But when fundamental rights are in question, this Court has repeatedly emphasized the difference in security of judicial over administrative action.** (Citations omitted. Emphasis added.)

285 U.S. at 60-61.

Further to the point, *St. Joseph Stock Yards Co. v. United States*, 298 U.S. 38 (1936) declares at p. 52:

> Legislative agencies, with varying qualifications, work in a field peculiarly exposed to political demands. Some may be expert and impartial, others subservient. **It is not difficult for them to observe the requirements of law in giving a hearing and receiving evidence. But to say that their findings of fact may be made conclusive where constitutional rights of liberty and property are involved, although the evidence clearly establishes that the findings are wrong and constitutional rights have been invaded, is to place those rights at the mercy of administrative officials and seriously to impair the security inherent in our judicial safeguards.** (Emphasis added.)

And, in another civil case: *Zinermon v. Burch*, 494 U.S.113, 125 (1990):

> First, the Clause incorporates many of the specific protections defined in the Bill of Rights. A plaintiff may bring suit under §1983 for state officials' violation of his rights to, e.g., freedom of speech or freedom from unreasonable searches and seizures. Second, the Due Process Clause contains a substantive component that bars certain arbitrary, wrongful government actions "regardless of

> the fairness of the procedures used to implement them." *Daniels v. Williams*, 474 U.S., at 331. * * * The Due Process Clause also encompasses a third type of protection, a guarantee of fair procedure.

Finally, specifically as to free speech of public employees:

> "To the extent that the Illinois Supreme Court's opinion may be read to suggest that teachers may constitutionally be compelled to relinquish the First Amendment rights they would otherwise enjoy as citizens to comment on matters of public interest in connection with the operation of the public schools in which they work, it proceeds on a premise which has been unequivocally rejected in numerous prior decisions of this Court. *Pickering v. Board of Education*, 391 U.S. 563, 568 (1968).

We now review the particular injustices imposed on Petitioner by the California courts in this case, all of which have been held to be such not only in this Court, but, equally pertinent, in California courts.

> **2. Due process and substantial justice have been denied because petitioner justifiably relied on the law of the case and other California law which held that he should not be prejudiced by the stay and by the**

failure of the California courts to apply accepted equitable principles.

The California courts effectively denied Petitioner any judicial review by allowing Respondents to obtain a stay of the California action and then reneging on their obligation to protect Petitioner from any resulting prejudice. Prejudice is clear: Petitioner in good faith did not file his claim for administrative mandamus during the period of the stay.

A. Respondents were estopped to take advantage of the stay.

In the first place Respondents should be bound by judicial estoppel from asserting that the California action is barred by the Statute of Limitations. Respondents judicially asserted that an adequate forum was available in New Mexico, asserting unequivocally in reply to Petitioner's opposition to the motion for stay that:

> A suitable alternative forum is unquestionably available in New Mexico.
> JA 174.

On the basis of that statement, the stay was granted and the case transferred to New Mexico on the ground of *forum non conveniens*. Once in New Mexico Respondents successfully asserted the Statute of Limitations . Then, having delayed matters for five years, the Regents were allowed to assert California's statute of limitations as soon as the stay was lifted. Having made a false statement and accepted the benefit thereof and having put Petitioner to great expense and

delay thereby, Respondents ought to have been estopped from taking further advantage of it. California follows this rule. *Herzog v. Frederics*, 61 Cal.App. 4th 672 (1998), 71 Cal.Rptr.2d 771.

Estoppel is not a new concept to this Court. In *Drexel v. Berney*, 122 U.S. 241, 253 (1887) the Court held:

> The ground of relief alleged in the present bill is, that by her acts and conduct the appellee has estopped herself, as against the complainants, from asserting any fact which annuls the executorship of James Berney under the Alabama probate, and the authority of St. James as his attorney in fact. **Estoppels of this character, as distinguished from estoppels by record or by deed, are called equitable estoppels. It is not meant thereby that they are cognizable only in courts of equity, for they are commonly enforced in actions at law**, as was fully shown in *Dickerson v. Colgrove*, 100 U.S. 578. But it does not follow, because equitable estoppels may originate legal, as distinguished from equitable rights, that it may not be necessary in particular cases to report to a court of equity in order to make them available. All that can properly be said is, that in order to justify a resort to a court of equity, it is necessary to show some ground of equity other than the estoppel itself, whereby the party entitled to the benefit of it is prevented from making it

> available in a court of law. **In other words, the case shown must be one where the forms of the law are used to defeat that which, in equity, constitutes the right. Such a case is one for equitable interposition.** [Emphasis added]

Nor has this Court abandoned the doctrine. *Oubre v. Entergy Operations*, 522 U.S. __ (1998), 139 L.Ed.2d 849 at 855 (1998) notes:

> As a rule, equitable estoppel bars a party from shirking the burdens of a voidable transaction for as long as she retains the benefits received under it.

The Respondents have accepted the benefits of their motion to stay, delaying Petitioner's case for more than five years by asserting that New Mexico provided a suitable forum for judicial review and using that wrongly obtained delay to have the case dismissed.

B. Petitioner has been fatally prejudiced by the stay.

The foregoing equities are reinforced by the unassailable legal facts: The law of this case and the law of other California cases quite clearly is that Petitioner ought not to have been prejudiced by the California order of stay and transfer to New Mexico as a supposedly more convenient forum.

1. The law of this case.

Petitioner appealed from the order granting Respondents's forum non conveniens motion and staying the action. The Court of Appeal denied that appeal and in the decision by Justice Reardon stated:

> It bears noting that the trial court stayed the California action pending the outcome of the New Mexico litigation; it did not dismiss the underlying action. **If New Mexico does not ultimately prove to be a suitable forum for Mascheroni, he will not have been prejudiced by the stay - he may petition the court to lift it at that time**. (Appendix D-7)(emphasis supplied.)

In the same opinion, Justice Reardon reserved for the trial court the decision whether "the Regents acted in bad faith in making inconsistent arguments" (Appendix D-7) , but that equitable stricture, too has been ignored, not only by the trial court, but also by the later Court of Appeal opinion, Appendix A.

Obviously, Petitioner has been sorely prejudiced: after much time and expense New Mexico did not prove to be a "suitable forum" for him and when he returned to renew his claim in California he was told that time had run despite the stay which prevented him from avoiding such a result by filing an appropriate pleading. This is an abysmal double bind, a Catch 22 in which the California court ought not to have participated.

2. The law of California.

Beard v. Superior Court, 39 C.A.2d 284 at 286 (1940) points out:

> It is the established law of California that the filing of a motion for the change of place of trial suspends the power of the trial court to act upon any other question until the motion has been determined [citations omitted] and that **any order made prior to the determination of the motion for a change of place of trial is a nullity .** [citation omitted].

Thus, by filing a motion for change of venue on March 29 1991, the Regents caused the Superior Court of the State of California to lose jurisdiction to enter any order authorizing Mascheroni to amend his complaint to include a petition for writ of administrative mandate.

When the trial court granted the motion for stay, that disability continued until the stay was lifted.

The Court of Appeal 1992 opinion quoted above simply recognized that in California, the concept that an alternative forum in which the issues can be fairly litigated is a prerequisite to staying or dismissing suit on grounds that the local forum is inconvenient. The Judicial Council Comments to California Code of Civil Procedure §410.30 state in part:

> Under the doctrine of inconvenient forum, a court, even though it has jurisdiction, will not

> entertain the suit if it believes that the forum of filing is a seriously inconvenient forum for the trial of the action. **But in such instances a more appropriate forum must be available to the plaintiff.** [Emphasis added.] West's Annotated Code Civil Procedure, §410.30 (1973 ed.), p. 490.

Delfosse v. CACI Ins. Federal, 218 Cal.App.3d at 689 (1990) cites the foregoing passage with approval. See also, Restatement (2d) Conflicts of Laws, §84, Comment C.

As the court in *Delfosse* stated:

> It strikes us as **anomalous, if not disingenuous**, to request dismissal of an action on the ground that it should be heard in another forum when **the action will likely never be heard** in the other forum because it is barred by the statute of limitations there. '*Delfosse*, *supra*, 218 Cal.App.3d at 690 (emphasis added) (quoting *Johnson v. Searle* (1989) 314 Md. 521, 552 A.2d 29.

Thus, Respondents knowingly sought and obtained a stay on the representation that New Mexico courts provided a suitable forum. By their own actions Respondents then made its own representation untrue by asserting statute of limitations and other successful defenses in the New Mexico actions.

It was Respondents' own actions which caused their

representation to become untrue and it was Respondents who obtained all the benefit of the untruth.

This Court stated in *Koster v. Lumbermens Mutual Casualty Co.*, 330 U.S. 518, 522 (1946),

> [In forum non conveniens actions], as in all other petitions for equitable relief, he who seeks equity must do equity, and **the court will be alert to see that its peculiar remedial process is in no way abused**. [Emphasis added.]

Conclusion

For the reasons stated the Supreme Court should grant certiorari and should order the California courts to grant judicial review of the termination of Dr Mascheroni.

Dated November 16 1998

Respectfully submitted

Richard Harrington
Attorney for petitioner
Pedro Leonardo Mascheroni PhD

Supreme Court, U.S.
FILED

98 844 SEP 15 1998

OFFICE OF THE CLERK

DOCKET NO. _____

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1998

PEDRO LEONARDO MASCHERONI,

Petitioner

v.

REGENTS OF THE UNIVERSITY OF CALIFORNIA, ET AL.

Respondents

APPENDICES TO PETITION FOR WRIT OF CERTIORARI TO THE COURT OF APPEAL FOR THE STATE OF CALIFORNIA, FIRST APPELLATE DISTRICT

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FILED MAR 31 1998
NOT TO BE PUBLISHED IN OFFICIAL REPORTS

IN THE COURT OF APPEAL
OF THE STATE OF CALIFORNIA
FIRST APPELLATE DISTRICT DIVISION FOUR

PEDRO LEONARDO MASCHERONI,

Plaintiff and Appellant,

v.

REGENTS OF THE UNIVERSITY OF CALIFORNIA et al.,

Defendants and Respondents.

A078918

(Alameda County Super. Ct. No. 675223-9)

The trial court sustained without leave to amend a demurrer filed by respondent Regents of the University of California challenging appellant Pedro Leonardo Mascheroni's complaint for wrongful termination. Mascheroni appeals the order sustaining the demurrer without leave to amend and the subsequent judgment of dismissal. He contends that (1) a complaint may properly join a petition for writ of mandate with other causes of action; (2) the trial court's stay of his California action against the Regents precluded him from filing a petition for writ of administrative mandate until the stay was lifted; (3) the statute of limitations on his petition for

writ of administrative mandate was tolled by the stay of his judicial action against the university; and (4) the limitations period of this cause of action was equitably tolled by the filing of his complaint for damages. We affirm the judgment.

I. FACTS

From 1979 to 1988, appellant Dr. Pedro Leonardo Mascheroni was employed by respondent Regents of the University of Califōrnia to work as a physicist at Los Alamos National Laboratory in New Mexico. In 1986, Mascheroni criticized some of the laboratory's projects, suggesting that its federally obtained funding would be better spent on other projects. His supervisors told Mascheroni to cease his criticism, but he did not. In January 1987, the laboratory's work force was reduced. Mascheroni's position was terminated and he was reassigned to another position, which was later terminated as well. His employment was terminated in March 1988.

In January 1991, Mascheroni filed an action for damages in Alameda County Superior Court against respondents Regents and the University of California[1], alleging that he had been wrongfully terminated from employment at the laboratory. He alleged that he was terminated because of his criticism of the laboratory's projects. He alleged causes of action for wrongful termination in violation of public policy, breach of contract of continued employment, breach of the implied covenant of good faith and fair dealing, and intentional and negligent infliction of

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1 For convenience, both respondents will be referred to as "the Regents."

emotional distress. He also filed a grievance with the Regents, which was formally and finally denied on February 8, 1991. In the civil action, the Regents moved for dismissal or stay of this action on forum non conveniens grounds, arguing that the action should be brought in New Mexico. In April 1991, Mascheroni had also brought action against the Regents in United States District Court in New Mexico. In May 1991, the trial court stayed the California action on forum non conveniens grounds. We upheld that stay order on appeal in July 1992. (Mascheroni v. Regents of the University of California (July 24, 1992) A054464 [nonpub. opn.].) Mascheroni's motion to modify or dissolve the stay was denied.

In July 1994, the Tenth Circuit of the United States Court of Appeals dismissed Mascheroni's state law claims and remanded the matter to the district court in New Mexico with instructions to vacate its judgment and dismiss for lack of jurisdiction over those claims. The federal appellate court also affirmed the district court's dismissal of Mascheroni's federal law claim. In September 1994, the United States District Court in New Mexico ordered that Mascheroni's complaint be modified to dismiss the state law claims without prejudice.

In October 1994, Mascheroni moved to vacate the stay in state court, seeking leave to file a first amended complaint and petition for writ of administrative mandate. The trial court denied the motion to vacate its earlier stay order. Mascheroni petitioned for a writ of mandate in this court, but we denied his petition in March 1995 and the California Supreme Court denied a petition for review the following month. In May 1996, a New Mexico state court ruled that Mascheroni's complaint was filed in that court outside the applicable periods of limitation. Thus, the complaint was

dismissed without prejudice.

In August 1996, Mascheroni again sought to vacate the stay and to file a first amended complaint and petition for writ of administrative mandate. In December 1996, the Alameda County court granted his motion to lift the stay, but denied his motion for leave to file an amended complaint as premature because it was filed while the stay was still in effect. A week later on December 30, 1996, Mascheroni filed his first amended complaint. The complaint alleged causes of action for tortious discharge in violation of public policy, breach of contract, breach of the covenant of good faith and fair dealing, intentional and negligence infliction of emotional distress, and also petitioned for a writ of administrative mandate.

In February 1997, the Regents demurred to the first amended complaint. After hearing on this motion, the trial court sustained the demurrer without leave to amend in April 1997. It held that the cause of action for administrative mandate was time-barred and that the remaining causes of action were defective because the complaint failed to allege exhaustion of administrative remedies.

II. NONMANDATE CLAIMS

First, we address the nonmandate causes of action to determine whether they were properly pled. Mascheroni contends that a complaint may properly join a petition for writ of mandate with other causes of action. The Regents counter that Mascheroni may not lawfully file any causes of action arising from his termination until he first obtains a writ of administrative mandate overturning the administrative finding that his termination was lawful. Put another way, the Regents

argue that Mascheroni's filing of his wrongful termination and other related nonmandate claims was premature and jurisdictional ly defective because he has not yet exhausted his judicial remedies by obtaining a writ of administrative mandate. (See Code Civ. Proc., § 1094.5.)

Under California law, the primary rights theory determines the scope of a cause of action. When determining what constitutes a primary right, the significant factor is the harm suffered. (*Swartzendruber v. City of San Diego* (1992) 3 Cal.App.4th 896, 904.) Both the civil action and the administrative grievance that Mascheroni asserted were predicated on the alleged impropriety of his termination. Under the primary rights theory, these claims are all part of a single claim for invasion of one primary right. (See *ibid*)

When a public[2] employee suffers an adverse determination in an administrative hearing and fails to challenge that determination by writ, the administrative decision becomes final and collaterally estops the employee from relitigating the validity of the hearing officer's adjudication. (*Oquendo* v. *California Institution for Women* (1989) 212 Cal.App.3d 520, 522-523; see *Swartzendruber* v. *City of San Diego, supra*, 3 Cal.App.4th at p. 903.) Thus, before the employee may bring an action against a public employer for claims arising from his or her termination, the

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2.The Regents of the University of California is a quasi-judicial agency deemed to be the equivalent of a state administrative agency. (*Apte* v. *Regents of University of California* (1988) 198 Cal.App.3d 1084, 1090-1091; *Regents of University of California* v. *City of Santa Monica* (1978) 77 Cal.App.3d 130, 135.)

employee must first overturn the adverse administrative determination by means of a petition for writ of administrative mandate. (*Swartzendruber* v. *City of San Diego, supra*, at p. 903; see *Westlake Community Hosp.* v. *Superior Court* (1976) 17 Cal.3d 465, 483-485 [summary judgment case].)

Mascheroni has not yet obtained a writ of administrative mandate. Thus, he has not exhausted his judicial remedies for the causes of action arising from his termination. (See *Swartzendruber* v. *City of San Diego, supra*, 3 Cal.App.4th at pp. 903-904 & fn. 2.) The lack of a writ of administrative mandate overturning the adverse administrative ruling constitutes a jurisdictional impediment to those claims necessarily based on a different version of the facts of the termination. (See *City of Fresno* v. *Superior Court* (1987) 188 Cal.App.3d 1484, 1490.) Thus, the trial court had no choice but to sustain the Regents' demurrer to the nonmandate aspects of Mascheroni's wrongful termination action without leave to amend and dismissed this portion of his complaint.

III. MANDATE

Mascheroni makes various challenges to the trial court's conclusion that his petition for writ of mandate was not timely filed. He argues that the stay of his state proceeding against the Regents precluded him from filing a petition for writ of administrative mandate until the stay was lifted. He claims that the limitations period for filing this petition was tolled by the stay of the initial complaint. Finally, Mascheroni contends that the limitations period for this cause of action was equitably tolled by the filing of his initial complaint. None of these claims are meritorious.

The administrative decision was rendered on February 8, 1991, when the Regents denied his grievance. An action for a writ of administrative mandate is a statutorily based action that must be commenced within three years. (See Code Civ. Proc., §§ 335, 338, subd. (a), 1094.5.) Thus, the time for commencing Mascheroni's action to obtain a writ of administrative mandate ended on February 8, 1994. Mascheroni did not file his petition until December 30, 1996, and thus, the petition was time-barred.

Mascheroni argues that the two aspects of the underlying action-the mandate petition and the complaint for the nonmandate causes of action-were properly joined and should be viewed as a single action. Under his theory, the time for filing the petition for writ of administrative mandate was tolled while the stay of the action on the initial complaint was in effect-from May 29, 1991, until December 23, 1996-and the December 30, 1996, petition for writ of administrative mandate was filed within the statutory three-year period. (See Code Civ. Proc., §§ 335, 338, subd. (a), 1094.5.)

However, we have already determined that the nonmandate causes of action were procedurally defective because Mascheroni did not obtain a writ of administrative mandate before filing his wrongful termination causes of action. (See pt. II., *ante*.) As the courts of this state had no jurisdiction to entertain these nonmandate claims until and unless Mascheroni *obtained*--not merely sought--a writ of administrative mandate, the entirety of the initial complaint was effectively void.

The running of a limitations period is suspended during any period in which the plaintiff is legally prevented

from taking action to protect his or her rights. (*Dillon* v. *Board of Pension Commrs.* (1941) 18 Cal.2d 427, 431.) Mascheroni was not legally prevented from filing his petition for writ of administrative mandate during the period of the stay of the initial complaint. In fact, he was obligated to file and to obtain such a writ before filing a proper wrongful termination action. (*Swartzendruber* v. *City of San Diego, supra*, 3 Cal.App.4th at p. 903; see *Westlake Community Hosp.* v. *Superior Court, supra*, 17 Cal.3d at pp. 483-485.) Both logically-because of the fatal defect in his initial complaint-and legally-in order to exhaust his judicial remedies, Mascheroni should have filed a separate petition for writ of administrative mandate during the three- year period from February 8, 1991, until February 8, 1994. The fate of his petition for writ of administrative mandate was not linked to that of the jurisdictionally defective January 1991 complaint, which was effectively void. Thus, we conclude that the trial court properly sustained the Regents' demurrer to Mascheroni's December 1996 petition for writ of administrative mandate because it was filed beyond the statute of limitations period.[3]

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[3]The initial complaint cannot be construed as a petition for a writ of mandate. (See, e.g., *Hill* v. *City of Manhattan Beach* (1971) 6 Cal.3d 279, 287.) As of the January 1991 filing of the initial complaint, the February 1991 administrative ruling denying Mascheroni's administrative grievance had not yet occurred. (See *Lee* v. *Bank of America* (1994) 27 Cal. App.4th 197, 205.)

FILED APR 17 1997

IN THE SUPERIOR COURT
OF THE STATE OF CALIFORNIA

IN AND FOR THE COUNTY OF ALAMEDA

PEDRO MASCHERONI,	)	No. 675223-9
Plaintiff	)	ORDER AFTER HEARING
vs.	)	
REGENTS OF UC, et al,	)	ON 4-17-97
Defendant	)	

This matter came on calendar on April 17, 1997 at 9:15 am in Dept. 81. The Court, having taken the matter under submission, now rules as follows: The tentative ruling is affirmed. The general demurrer to the 1st cause of action is SUSTAINED WITHOUT LEAVE TO AMEND as it is time-barred. Demurrers to 2nd-7th causes of action SUSTAINED WITHOUT LEAVE TO AMEND for failure to allege exhaustion of Judicial remedies. See *Swartzendruber v. City of San Diego* (1992) 3 Cal App 4th 896.

Date APR 17 1997

Sandra Margulies
JUDGE SANDRA MARGULIES

IT IS SO ORDERED.

FILED DEC 23 1996

SUPERIOR COURT OF THE STATE OF CALIFORNIA

IN AND FOR THE COUNTY OF ALAMEDA

PEDRO LEONARDO MASCHERONI, Plaintiff,

vs.

THE REGENTS OF THE UNIVERSITY OF CALIFORNIA, and DOES 1-50. Defendant

No. 675223-9

ORDER AFTER HEARING RE MOTION TO LIFT STAY AND LEAVE TO FILE FIRST AMENDED COMPLAINT:

The motion of plaintiff. Pedro Leonardo Mascheroni to Vacate Stay and for Leave to File First Amended Complaint came on regularly for hearing before this Court on November 25, 1996 at 10:00 a.m. in Department 81 in the above entitled Court. Richard Harrington, of Chandler, Wood, Harrington & Maffi, appeared on behalf of plaintiff. Kirsten Komoroske of Becherer, Beers, Murphy, Kannett & Schweitzer appeared on behalf of defendant, The Regents of the University of California.

The Court, after taking the matter under submission, and having considered all papers filed in support of the motion, all papers filed in opposition to the motion, all papers filed in reply to the motion, and the oral arguments of counsel, hereby rules as follows:

The motion to lift stay is granted. See Archibald v. Cinerama Hotels (1976) 15 Cal.3 d 853, 862.

The motion for leave to file a first amended complaint is denied without prejudice as premature. The motion was filed while the stay was in effect.

IT IS SO ORDERED.

DATED: 12/18/96

The Honorable Sandra Margulies
Judge of the Superior Court

FILED JUL 24 1992

NOT TO BE PUBLISHED IN OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE
STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION FOUR

PEDRO LEONARDO MASCHERONI,

Plaintiff and Appellant,

v.

REGENTS OF THE UNIVERSITY OF CALIFORNIA et al.,

Defendants and Respondents.

A054464

Alameda County (Super. Ct. No. 675223-9)

Appellant Pedro Leonardo Mascheroni filed an action against respondents Regents of the University of California and the University of California[1] alleging that he had been

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1. For convenience, both respondents will be referred to as "the Regents."

wrongfully terminated from employment at Los Alamos National Laboratory in New Mexico. The trial court granted the Regents' motion to stay the action on forum non conveniens grounds. (See Code Civ. Proc., S 410.30.)[2] Mascheroni appeals,[3] contending that the stay order leaves him without a suitable alternative forum where he may fully and fairly litigate his claim. He has also moved for sanctions. We affirm the stay order and deny the request for sanctions.

I. FACTS

From 1979 to 1988, appellant Dr. Pedro Leonardo Mascheroni was employed by respondent Regents to work as a physicist at Los Alamos National Laboratory in New Mexico. In 1986, Mascheroni criticized some of the laboratory's projects, suggesting that its federally obtained funding would be better spent on other projects. His supervisors told Mascheroni to cease his criticism, but he did not. In January 1987, the laboratory's work force was reduced. Mascheroni's position was terminated and he was

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2. All statutory references are to the Code of Civil Procedure.

3. Mascheroni filed a timely appeal from the order staying the action on forum non conveniens grounds and from the order denying his motion to vacate that order. An order granting a motion to stay an action on forum non conveniens grounds is appealable. (§ 904.1, subd. (C).) Although it is unclear whether an order denying a motion to vacate such an order is also appealable, Mascheroni's brief does not address the appeal from the denial of the motion to vacate. (See § 1710.40.) Therefore, we need not determine whether this order is independently appealable.

reassigned to another position, which was later terminated as well. His employment was terminated in March 1988.

In January 1991, Mascheroni filed a complaint against the Regents for damages in Alameda County Superior Court in California. He alleged that he was terminated because of his criticism of the laboratory's projects. He alleged causes of action for wrongful termination in violation of public policy, breach of contract of continued employment, breach of the implied covenant of good faith and fair dealing, and intentional and negligent infliction of emotional distress. The Regents moved for dismissal or stay of this action on the grounds of forum non conveniens, arguing that the action should be brought in New Mexico. By April 1991, Mascheroni had also brought action against the Regents in United States District Court in New Mexico. In May 1991, the trial court stayed the California action on forum non conveniens grounds. Mascheroni's motion to modify or dissolve the stay was denied. After he filed his notice of appeal from the stay order in this action, some claims raised in the New Mexico action have been dismissed.

II. FORUM NON CONVENIENS

Mascheroni contends that the trial court abused its discretion in issuing the stay order on forum non conveniens grounds. He argues that the order leaves him without a suitable alternative forum where he may fully and fairly litigate his claim, especially now that some of his claims have been formally dismissed in the New Mexico forum. He also contends that there were no valid alternative grounds on

which the trial court could properly have based its order.[4]

When a court finds that in the interests of justice an action should be heard in a forum outside California, the court must dismiss or stay the action. (S 410.30, subd. (a).) Forum non conveniens is an equitable doctrine invoking the discretionary power of a court to decline to exercise its jurisdiction over a transitory cause of action when it believes that the action may be more appropriately, justly tried elsewhere. The party moving for dismissal or stay bears the burden of proof. The grant or denial of the motion is within the trial court's discretion. On appeal, we accord substantial deference to the trial court's determination. (Stangvik v. Shiley Inc. (1991) 54 Cal.3d 744, 751.)

When determining whether to grant a motion on forum non conveniens grounds, the trial court must first determine whether the alternative forum is a suitable place for trial. (Stangvik v. Shiley Inc., supra, 54 Cal.3d at p. 751.) "[This is a nondiscretionary determination by the trial court." (Shiley Inc, v. Superior Court (1992) 4 Cal.App.4th 126, 131.) An action may not be dismissed unless a suitable alternative forum is available to the plaintiff. If there is no suitable alternative forum--if the defendant is not subject to jurisdiction elsewhere or if the plaintiff's action is barred elsewhere by the statute of limitations--the suit will be entertained in our forum, no matter how inappropriate it may be, unless the court is willing to accept the stipulation that the

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4. As the result of actions taken by the United States District Court in New Mexico after briefing was completed in this appeal, the parties have filed additional letter briefs and urged this court to consider them. We have done so.

defendant will not raise this defense in the alternative forum. (Stangvik v. Shiley Inc., supra, at p. 752.)

On appeal, Mascheroni argues that the trial court abused its discretion because the stay order gives him no option but to proceed in New Mexico where the applicable law denies him an effective remedy and the statute of limitations bars his claims. However, even if this is so, it is irrelevant to the matter before us. When a cause of action arises in another state and that state's limitations period precludes maintenance of an action in that state, an action shall not be maintained in this state, except in favor of one who has been a California citizen and who has held the cause of action from the time it accrued. (S 361.) Mascheroni was not a resident of this state at the time that his causes of action accrued. In this situation, section 361 has the effect of borrowing the statute of limitations of New Mexico for use in this state. (See Delfosse v. C.A.C.I.. Inc.-Federal (1990) 218 Cal.App.3d 683, 691.) Thus, the New Mexico limitations period applies even if this action were tried in California (see S 361; Biewend v. Biewend (1941) 17 Cal.2d 108, 115; Delfosse v. C.A.C.I.. Inc.-Federal, supra, at pp. 691-692; Outboard Marine Corp.. v. Superior Court (1976) 59 Cal.App.3d 434, 440-441), and can have no bearing on our determination of whether a suitable forum exists in that state. Considering the factors that we are permitted to consider, the trial court properly concluded that the United States District Court in New Mexico is a suitable alternative forum for this action.[5]

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5. Mascheroni has cited a Judicial Council comment to section 410.30 that states, in part, that a "suit will be entertained, no matter how inappropriate the forum may be, if

The second issue to be resolved is whether the balance of private and public interests justified a stay of the action. (See Stangvik v. Shiley Inc., supra, 54 Cal.3d at p. 752.) The private interest factors are those such as the ease of access to sources of proof, the cost of obtaining attendance of witnesses, and the availability of compulsory process for attendance of unwilling witnesses. The public Interest factors include avoidance of overburdening local courts with congested calendars, protecting the interests of potential jurors so that they are not called on to decide cases in which the local community has little concern, and weighing the competing interests of California and New Mexico in the litigation. (See j~L, at p. 751). In the case at bar, these factors support the trial court's stay of the California action in favor of trial in New Mexico. The plaintiff and the witnesses are in New Mexico. The place of employment was in New Mexico. The evidence is located in that state. New Mexico law applies, at least in some respects. (See S 361.) The competing interests of the two states in this litigation favor trial in New Mexico.

.... the plaintiff's cause of action would elsewhere be barred by the statute of limitations, unless the court is willing to accept the defendant's stipulation that he will not raise this defense in the second state [citations]." (Judicial Council com., 14 West's Ann. Code Civ. Proc. (1973 ed.) § 410.30, pp. 492-493.) The language "elsewhere be barred" clearly envisions the application of different limitation periods where the action would be barred in the foreign state but not barred in California. Such is not our case because of California's borrowing statute (see § 361), and no stipulation waiving the statute of limitations was required.

The final inquiry is whether the possibility of an unfavorable change in the law in the alternative forum will result in a remedy that is so clearly inadequate or unsatisfactory that it is no remedy at all. (See Stangvik v. Shiley Inc., supra, 54 Cal.3d at p. 753.) The fact that an alternative jurisdiction's law is less favorable to a litigant than California law should not be afforded any weight when deciding a forum non conveniens motion if some remedy is afforded. Id., at pp. 753-754, fn. 5, 764.) The New Mexico court's latest order gives Mascheroni the right to file an amended complaint stating a title VII claim. Even now that the New Mexico court has precluded some of his claims, Mascheroni is not precluded from obtaining some relief in that forum. Thus, the unfavorable change in the law--assuming that such a change in the law exists--cannot be considered. at pp. 753-754, fn. 5.)

It bears noting that the trial court stayed the California action pending the outcome of the New Mexico litigation; it did not dismiss the underlying action. If New Mexico does not ultimately prove to be a suitable forum for Mascheroni, he will not have been prejudiced by the stay--he may petition the court to lift it at that time. The trial court did not abuse its discretion in granting the stay. (See Stangvik v. Shiley Inc., supra, 54 Cal.3d at p. 751.)

III. SANCTIONS

Mascheroni has also moved for sanctions, arguing that the Regents acted in bad faith by making inconsistent arguments in California and New Mexico courts. Whether arguments presented in the trial courts are inconsistent and suggestive of bad faith are best resolved by the trial courts under the circumstances of this case.

IV. CONCLUSION

The order granting a stay is affirmed. The request for sanctions is denied without prejudice to renewal in the superior court.

Reardon, J.

WE CONCUR:

Poche, Acting P.J.

Perley, J.

FILED MAY 29 1991

SUPERIOR COURT OF THE STATE OF CALIFORNIA

IN AND FOR THE COUNTY OF ALAMEDA

PEDRO LEONARDO MASCHERONI, Plaintiff,

vs.

THE REGENTS OF THE UNIVERSITY OF CALIFORNIA, and DOES 1-50. Defendant

No. 675223-9

ORDER OF STAY

Defendant's motion to stay or dismiss this lawsuit based on forum non conveniens was heard by this court, Department 19, on April 29, 1991. Anthony Graham of Chandler, Wood, Harrington & Maffly appeared on behalf of plaintiff. John Beers of Crosby, Heafey, Roach & May Professional Corporation appeared on behalf of defendant.

Upon reviewing defendant's moving papers and reply papers, and plaintiff's opposition papers, and after consideration of the argument presented at the hearing on this motion, and good cause appearing, the Court ordered that this action No. 675223-9 be stayed on grounds of forum non conveniens, or alternatively that the action be dismissed on terms acceptable to each party if agreement on such terms could be reached by the parties.

Upon being advised by the parties that agreement on terms of dismissal could not be reached, IT IS HEREBY ORDERED, ADJUDGED AND DECREED that:

This action (No. 675223-9 in the Superior Court of California, County of Alameda) is hereby stayed.

Dated: April 29 1991.

AND PRESENTED FOR SIGNATURE AND SIGNED MAY 29 1991

JAMES R. LAMBDEN,

Judge of the Superior Court

FILED JUN 17 1998

First Appellate District, Division Four, No. A078918
SO70179

IN THE SUPREME COURT OF CALIFORNIA

Pedro Leonardo Mascheroni, Appellant

v

Regents of the University of California et al,
Respondents

Appellant's petition for review DENIED.

[GEORGE]

Chief Justice

FILED APR 26 1995

Frst Appellate District, Division Four, No. A068666
SO45602

IN THE SUPREME COURT OF CALIFORNIA

PEDRO LEONARDO MASCHERONI, Petitioner

v

ALAMEDA COUNTY SUPERIOR COURT, Respondent

REGENTS OF THE UNIVERSITY OF CALIFORNIA,
Real Party In Interest

Petition for review DENIED.

[LUCAS]

Chief Justice

ENTERED APR 26 1995

FIRST JUDICIAL DISTRICT
COUNTY OF SANTA FE
STATE OF NEW MEXICO

No. SF 95-1694 (c)

PEDRO LEONARDO MASCHERONI,

Plaintiff,

vs.

BOARD OF REGENTS OF THE UNIVERSITY OF CALIFORNIA, UNIVERSITY OF CALIFORNIA, and LOS ALAMOS NATIONAL LABORATORY, and JOHN DOES 1-50,

Defendants.

ORDER

THIS MATTER COMING BEFORE THE COURT for consideration of

Defendants' Rule 12(b) defenses, and the Court having heard argument of counsel on April 1, 1996, and having reviewed the memorandum of law, and being advised in the premises,

IT IS HEREBY ORDERED:

1. The Complaint was filed outside all applicable New

Mexico tort and

2. The Complaint herein should be, and hereby is, dismissed without prejudice.

MICHAEL E. VIGIL

DISTRICT COURT JUDGE

FILED MAR 15 1995

STATE OF CALIFORNIA
COURT OF APPEAL
FIRST APPELLATE DISTRICT
DIVISION FOUR

PEDRO LEONARDO MASCHERONI
v.
SUPERIOR COURT, ALAMEDA COUNTY
THE REGENTS OF THE UNIVERSITY OF CALIFORNIA

A068666
Alameda County
Sup. Ct. No. 6752239

BY THE COURT:

Petitioner's application for permission to file his reply to the opposition is granted.

The petition is denied.

(Anderson, P.J., Perley, J. and Reardon, J. participated in the decisions.)

Dated: MAR 15 1995

[POCHE, ACTING P.J.] P.J.

FILED NOV 28 1994

SUPERIOR COURT OF CALIFORNIA -
COUNTY OF ALAMEDA

PEDRO LEONARDO MASCHERONI,
Plaintiff,

vs.

THE REGENTS OF THE UNIVERSITY OF CALIFORNIA, and DOES 1-50,
Defendants.

_____/

No. 675223-9

ORDER DENYING
PLAINTIFF PEDRO LEONARDO MASCHERONI'S
MOTION TO VACATE ORDER OF STAY

Plaintiff Pedro Leonardo Mascheroni's Motion to Vacate Order of Stay came before the Court on November 15, 1994, in Department 81, the Honorable James R. Lambden presiding. Chandler, Wood, Harrington & Maffly, by Richard Harrington, [not] appeared on behalf of plaintiff. Crosby, Heafey, Roach & May, by Kirsten Komoroske [not] appeared on behalf of defendant. The Regents of California.

After full consideration of the papers in support of and in opposition to plaintiff's motion, and with good cause appearing, the Court finds and orders as follows:

IT IS ORDERED that plaintiff's Motion to Vacate Order of Stay is DENIED.

DATED: Nov. 15, 1994

AND PRESENTED FOR
SIGNATURE AND SIGNED
NOV 28 1994 JAMES R. LAMBDEN

JUDGE OF THE SUPERIOR
COURT

FILED SEP 6 1994

UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF NEW MEXICO

PEDRO LEONARDO MASCHERONI,

Plaintiff,

VS.

BOARD OF REGENTS OF THE UNIVERSITY OF CALIFORNIA, et al.,

Defendants.

ORDER ON REMAND

No. CIV 91-399 JC/RWM

THIS MATTER came on for consideration of the July 11, 1994 opinion entered by the Tenth Circuit Court of Appeals in the above-captioned case. The Tenth Circuit affirmed dismissal with prejudice of the Title VII claim, but found that the Eleventh Amendment prohibited this Court from exercising jurisdiction over the state law claims.

Wherefore,

IT IS ORDERED that the April 15, 1992 order of Dismissal of the Second Amended Complaint be, and hereby is, modified to dismiss the state law claims without prejudice. In all other respects the Order of April 15, 1992 remains

unchanged.

DATED August 31, 1994.

John E. Conway
UNITED STATES DISTRICT JUDGE

FILED JUL 11 1994

PEDRO LEONARDO MASCHERONI,
Plaintiff-Appellant,

v.

BOARD OF REGENTS OF THE UNIVERSITY OF CALIFORNIA, UNIVERSITY OF CALIFORNIA, LOS ALAMOS NATIONAL LABORATORY,
Defendants-Appellees.

No. 93-2021

UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

28 F.3d 1554

PRIOR HISTORY: [**1] Appeal from the United States District Court for the District of New Mexico. (D.C. No. CIV-91-399-JC). D.C. Judge JOHN E. CONWAY

CORE TERMS: regents, immunity, state law, continuing violation, supervisors, discriminatory, arm, termination, sua sponte, jurisdictional, entity, laboratory, security clearance, limitations period, sovereign immunity, filing period, national origin, permissive, certification, deception, tenure, governmental entities, applicability, occurrence, occurring, mandatory, empowered, tolled, sponte, waive

COUNSEL: Michael D. Bustamante, Albuquerque, New Mexico (Roberto D. Ortega, Albuquerque, New Mexico, and Richard Harrington of Chandler, Wood, Harrington &

Maffly, San Francisco, California, with him on the briefs) for Plaintiff-Appellant.

Daniel H. Friedman of Simons, Cuddy & Friedman, Santa Fe, New Mexico, for
Defendants-Appellees.

JUDGES: Before BALDOCK, BRORBY, and EBEL, Circuit Judges.

OPINIONBY: EBEL

OPINION:
[*1555] EBEL, Circuit Judge.

Dr. Pedro Leonardo Mascheroni ("Dr. Mascheroni") appeals two orders dismissingstate law causes of action and a federal Title VII claim against his former employer, the Board of Regents of the University of California (the "Board of Regents"). While we affirm the court's dismissal of the Title VII [*1556] claim as time barred, we hold that the court improperly exercised jurisdiction over Dr. Mascheroni's state law claims because the Eleventh Amendment shields the Board of Regents from suit in federal court for alleged state law violations.

I. BACKGROUND

The Board of Regents operates the Los Alamos National Laboratory in New Mexico under a contract with the United States Department of Energy ("DOE"). Dr. Mascheroni was employed by the Board of Regents between 1979 and 1988 as a physicist at the Los Alamos National Laboratory. This suit arises from his supervisors' actions, which he alleges were

based on his national origin, and his ultimate termination from the Los Alamos National Laboratory. Although a United States citizen since 1972, Dr. Mascheroni is Argentine by birth. another division in April 1987. Between April and May 1987, Dr. Mascheroni was investigated for alleged security infractions. Based on his supervisors' recommendations, the DOE withdrew his security clearance in September 1987.

- - - - - - - - - - - - - - - - - - -Footnotes- - - - - - - - - - - - - - - - -

n1 Dr. Mascheroni contends that he fell into disfavor with his supervisors when he criticized a proposed krypton fluoride laser project and sought to promote his hydrogen fluoride laser project in its place. Of course, to the extent that Dr. Mascheroni's difficulties stemmed from a dispute over technical issues, that undermines his claim that he was discriminated against because of national origin. The mere fact that Dr. Mascheroni possesses a protected classification does not give him special rights beyond the right not to be discriminated against because of the classification.

- - - - - - - - - - - - - - - - - -End Footnotes- - - - - - - - - - - - - - - -

[**3]

Dr. Mascheroni was ultimately dismissed from the Los Alamos National Laboratory in March 1988. Approximately 140 days later, on August 3, 1988, Dr. Mascheroni filed a complaint with the New Mexico Human Rights Commission, alleging discrimination based on national origin. The Commission referred Dr. Mascheroni's complaint to the Equal Employment Opportunity Commission ("EEOC") on November 27, 1990. Because neither the New Mexico Human Rights Commission nor the EEOC filed an action on Dr. Mascheroni's behalf within 180 days of the date he filed his complaint, Dr. Mascheroni received notice of his right to sue in January 1991.

On January 24, 1991, Dr. Mascheroni filed a complaint against the Board of Regents in California Superior Court, alleging multiple tort and breach of contract theories of recovery. n2 The Board of Regents moved for a stay on the grounds of forum non conveniens. Meanwhile, on April 24, 1991, Dr. Mascheroni filed a Title VII claim in the United States District Court for the District of New Mexico. In May 1991, the California Superior Court stayed Dr. Mascheroni's state law suit and subsequently denied Dr. Mascheroni's motion to dissolve the stay. Next, on May 7, 1991, Dr. Mascheroni amended his Title VII complaint in the District of New Mexico to include the state law claims asserted in the California Superior Court. He also added to this amended complaint new state law claims of tortious discharge, whistle-blower liability, and prima facie tort.

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n2 The state law causes of action included wrongful termination, breach of contract of continued employment, breach of the implied covenant of good faith and fair dealing, and negligent and intentional infliction of emotional distress.

- - - - - - - - - - - - - - - - - -End Footnotes- - - - - - - - - - - - - - - -

The district court first granted the Board of Regents' Fed. R. Civ. P. 12(b) motion to dismiss the state law claims. Order of July 17, 1992. The court concluded that the Board of Regents, by virtue of operating the Los Alamos National Laboratory in New Mexico, enjoys the same immunities to tort actions available to New Mexico state governmental entities under the New Mexico Tort Claims Act, N.M. Stat. Ann. 41-4-1 to -29. The court additionally held that Dr. Mascheroni's contract claims were barred by New Mexico's statute of limitations, N.M. Stat. Ann. §37-1-23. The district court permitted Dr. Mascheroni to amend his Title VII

complaint to demonstrate that he had timely filed the original complaint with the New Mexico Human Rights Commission. Because New Mexico is a deferral state, Dr. Mascheroni had to show that the Board of Regents' allegedly discriminatory actions occurred within 300 days of the date on which he filed his complaint with the Commission. n3 It was undisputed that the reduction-in-force ("RIF") at the Los Alamos National Laboratory and the supervisors' recommendation to strip Dr. Mascheroni of his security clearance occurred in excess of 300 days before Dr. Mascheroni filed his complaint with the Commission.

- - - - - - - - - - - - - - - - - - -Footnotes- - - - - - - - - - - - - - - - - -

n3 Title VII provides a 180-day filing period after the occurrence of an unlawful discriminatory practice. <=1> 42 U.S.C. 2000e-5(e), as amended by 2000e-5(e)(1). The period is extended to 300 days in "deferral states," where the EEOC defers to the enforcement efforts of a state agency empowered to undertake employment discrimination investigations. See EEOC v. Commercial Office Prods. Co., 486 U.S. 107, 110-12, 100 L. Ed. 2d 96, 108 S. Ct. 1666 (1988); Aronson v. Gressly, 961 F.2d 907, 911 (10th Cir. 1992).

- - - - - - - - - - - - - - - - - -End Footnotes- - - - - - - - - - - - - - - -

In his second amended complaint filed on April 27, 1992, however, Dr. Mascheroni invoked the continuing violation doctrine in an attempt to cure his failure to file a timely complaint. Dr. Mascheroni argued that his ultimate dismissal from the Los Alamos National Laboratory, which occurred within the 300-day period, was sufficiently related to the RIF and security violation allegations so as to establish a pattern of discrimination based on national origin. Alternatively, Dr. Mascheroni's amended complaint invoked the doctrine of

equitable tolling, alleging that because his supervisors actively deceived him and lulled him into not filing a Title VII complaint with the New Mexico Human Rights Commission, the filing period should be tolled. The court, however, dismissed Dr. Mascheroni's amended Title VII complaint as time barred because Dr. Mascheroni failed to demonstrate a continuing violation or to allege facts sufficient to warrant equitable tolling of the limitations period. Order of December 14, 1992.

Before us is Dr. Mascheroni's appeal from both district court orders. He argues that (1) dismissal of the state law claims against a California entity based on New Mexico immunity principles was improper; and (2) his Title VII complaint was timely filed.

II. STATE LAW CLAIMS

We first consider Dr. Mascheroni's appeal from the district court's dismissal of his state tort and breach of contract claims. Dr. Mascheroni argues that the sovereign immunity bestowed on New Mexico state governmental entities under the New Mexico Tort Claims Act does not apply to a foreign governmental entity whose alleged tortious acts occurred in New Mexico. Alternatively, Dr. Mascheroni asks us to certify this question of first impression to the New Mexico Supreme Court. n4 However, because we conclude that the Eleventh Amendment bars Dr. Mascheroni's state law claims in federal court against the Board of Regents, both we and the district court lack jurisdiction to consider whether the New Mexico Tort Claims Act applies to a California state governmental entity operating in New Mexico, or to certify this question to the New Mexico Supreme Court.

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n4 The New Mexico Supreme Court accepted certification of essentially the same question in two prior cases, but dismissed certification in both cases on mootness grounds following settlement of the underlying litigations. Sandford v. Giles, CIV 92-368) (D. N.M.), certification accepted (No. 21,133) (N.M. April 19, 1993), dismissed (N.M. November 4, 1993); In re: Los Alamos Litigations, Individuals and Putative Class Representatives v. Board of Regents of the University of California (No. 92-6005) (D. N.M.), certification accepted (No. 21,326) (N.M. June 28, 1993), dismissed (N.M. January 25, 1994).

- - - - - - - - - - - - - - - - -End Footnotes- - - - - - - - - - - - - - - -

The Eleventh Amendment imposes a constitutional limitation on the jurisdiction of Article III courts. U.S. Const. amend. XI ("The Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State.") (emphasis added); <=4> Pennhurst State School & Hosp. v. Halderman, 465 U.S. 89, 98, 79 L. Ed. 2d 67, 104 S. Ct. 900 (1984) (noting that the Eleventh [*1558] Amendment "affirms that the fundamental principle of sovereign immunity limits the grant of judicial authority in Art. III.").

Whether an Eleventh Amendment bar that is not raised by the parties must be considered sua sponte by a court when its applicability is discovered or whether it is subject to the discretion of the court as to whether sua sponte to address an unraised Eleventh Amendment issue, has been subject to prolonged debate. In Pennhurst, the Supreme Court embraced the mandatory rule, explaining that a "federal court must

examine each claim in a case to see if the court's jurisdiction over that claim is barred by the Eleventh Amendment." <=5> Id. at 121 (emphasis added); see also <=6> Charley's Taxi Radio Dispatch v. SIDA of Hawaii, 810 F.2d 869, 873 n.2 (9th Cir. 1987) ("The Eleventh Amendment may be described as either creating an immunity for states or establishing a jurisdictional limitation on federal courts . . . Like a jurisdictional bar and unlike a traditional immunity, however, the effect of the Eleventh Amendment must be considered sua sponte by federal courts.") (emphasis added). Other circuits impliedly adopt this mandatory rule. See, e.g., Atlantic Healthcare Benefits Trust v. Googins, 2 F.3d 1, 4 (2d Cir. 1993) ("Although the parties do not address the Eleventh Amendment in their briefs, we raise it sua sponte because it affects our subject matter jurisdiction."), cert. denied, 126 L. Ed. 2d 656, 114 S. Ct. 689 (1994); Sindia Expedition v. Wrecked & Abandoned Vessel, 895 F.2d 116, 119 (3d Cir. 1990) (explaining that "we have 'a special obligation' to satisfy ourselves of our own and the district court's jurisdiction"); Morris v. Washington Metropolitan Area Transit Authority, 226 U.S. App. D.C. 300, 702 F.2d 1037, 1040 (D.C. Cir. 1983) ("Such matters casting doubt upon the existence of federal subject matter jurisdiction [on the basis of Eleventh Amendment immunity] are the proper subject of consideration on the court's own motion, as neither the consent or omission of the parties nor the acquiescence of the court can confer jurisdiction where none exists."); Whiting v. Jackson State University, 616 F.2d 116, 127 n.8 (5th Cir. 1980) ("Although neither [defendant] has raised the bar of the eleventh amendment, we consider it sua sponte because a defense based upon the eleventh amendment is in the nature of a jurisdictional bar.").

At the same time, however, other authority adheres to a

permissive rule that grants courts the discretion whether to consider sua sponte a potential Eleventh Amendment bar to a suit against a state. See, e.g., Benning v. Board of Regents of Regency Universities, 928 F.2d 775, 777 n.2 (7th Cir. 1991) ("We are not obliged to reach the Eleventh Amendment issue because the Eleventh Amendment doctrine of sovereign immunity, though often characterized as jurisdictional, does not function as a true jurisdictional bar."). Two years prior to Pennhurst, the Supreme Court appeared to have adopted this permissive rule in dicta in <=13> Patsy v. Board of Regents, 457 U.S. 496, 516 n.19, 73 L. Ed. 2d 172, 102 S. Ct. 2557 (1982). In Patsy, the Court observed that because a state can waive Eleventh Amendment immunity, the Court has "never held that it is jurisdictional in the sense that it must be raised and decided by this Court on its own motion." Id. Because the Supreme Court's subsequent opinion in Pennhurst did not expressly overrule Patsy, the continued vitality of the permissive rule remains uncertain.

The two recent cases from our circuit to address this question did not explicitly adopt either the mandatory or the permissive rule, but in both instances the court did in fact consider sua sponte whether the Eleventh Amendment barred its jurisdiction. AMISUB (PSL) v. Colorado Dept. of Social Services, 879 F.2d 789, 792 n.5 (10th Cir. 1989), cert. denied, 496 U.S. 935, 110 L. Ed. 2d 660, 110 S. Ct. 3212 (1990); <=16> Esparza v. Valdez, 862 F.2d 788, 793-94 (10th Cir. 1988), cert. denied, 492 U.S. 905, 106 L. Ed. 2d 565, 109 S. Ct. 3214 (1989). In Esparza, we recognized that the "Supreme Court appears never to have decided precisely whether a court can or should raise Eleventh Amendment jurisdictional issues sua sponte." <=18> 862 F.2d 788, 793-94 (quoting both the permissive language from footnote 19 in Patsy and the declarative statement in Pennhurst that

"inferred that sua sponte consideration is necessary").

[*1559] We need not decide whether we are required or merely authorized to consider sua sponte the Eleventh Amendment's applicability because, in either event, the law is clear that we may consider whether the Eleventh Amendment bars Dr. Mascheroni's state law claims against the Board of Regents. And, in this case, whether we are compelled to address the Eleventh Amendment issue or whether we merely exercise our discretion to address the issue, we do address it and we find it dispositive of the issues on appeal pertaining to Dr. Mascheroni's state law claims.

The threshold Eleventh Amendment issue is whether the Board of Regents is an arm of the state for Eleventh Amendment purposes. "The Eleventh Amendment arm-of-the-state doctrine bestows sovereign immunity on entities created by state governments that operate as alter egos or instrumentalities of the states." Alex E. Rogers, Note, Clothing State Governmental Entities with Sovereign Immunity: Disarray in the Eleventh Amendment Arm-of-the-State Doctrine, <=19> 92 Colum. L. Rev. 1243, 1243 (1992). Under the arm-of-the-state doctrine, courts classify state governmental bodies according to a dichotomy, in which arms of the state enjoy Eleventh Amendment immunity, whereas political subdivisions such as counties and cities do not. See Lake Country Estates v. Tahoe Regional Planning Agency, 440 U.S. 391, 402, 59 L. Ed. 2d 401, 99 S. Ct. 1171 (1979) (denying Eleventh Amendment immunity to a bi-state agency that was more akin to a political subdivision than an arm of the State); Mt. Healthy Bd. of Educ. v. Doyle, 429 U.S. 274, 280, 50 L. Ed. 2d 471, 97 S. Ct. 568 (1977) [**14] (concluding that an Ohio school board was "more like a county or city than it [was] like an arm of the State");

Ambus v. Granite Bd. of Educ., 995 F.2d 992, 994 (10th Cir. 1993) (en banc) (Eleventh Amendment immunity "extends only to the states themselves and to those governmental entities that are 'arms of the state.'").

Although we have never considered whether the Board of Regents of the University of California is an arm of California and thereby immune from suit in federal court, the Ninth Circuit has held that Eleventh Amendment immunity applies to the Board of Regents of the University of California, the entity Dr. Mascheroni names in the instant suit. Jackson v. Hayakawa, 682 F.2d 1344, 1350 (9th Cir. 1982); see also <=24> Armstrong v. Meyers, 964 F.2d 948, 949-50 (9th Cir. 1992). In so ruling, the Ninth Circuit relied on language in <=25> Hamilton v. Regents, 293 U.S. 245, 257, 79 L. Ed. 343, 55 S. Ct. 197 (1934), that the "regents are, with exceptions not material here, fully empowered in respect of the organization and government [**15] of the 28 F.3d 1554, *1559; 1994 U.S. App. LEXIS 16987, **15; LEXSEE 65 Fair Empl. Prac. Cas. (BNA) 632; 65 Empl. Prac. Dec. (CCH) P43,276 university, which, as it has been held, is a constitutional department or function of the state government." The Ninth Circuit reached this conclusion by examining the state law characterization of the Board of Regents and the other factors upon which we relied in Ambus, 995 F.2d at 1350, such as the state law characterization of the entity, the guidance and control that the state exercises over the entity, the degree of state funding the entity receives, and whether the state has empowered the entity to issue bonds and levy taxes. See, e.g., Jackson, 682 F.2d at 1350. n5 We concur with this conclusion and therefore conclude that the Board of Regents is clothed with Eleventh Amendment immunity.

- - - - - - - - - - - - - - - - - -Footnotes- - - - - - - - - - - - - - - - -

n5 Within our circuit, we have likewise held that the Board of Regents of the University of Oklahoma is an arm of the state under the Eleventh Amendment, Seibert v. University of Oklahoma Health and Sciences Center, 867 F.2d 591, 594 (10th Cir. 1989), as is the Board of Regents of the New Mexico School of Mines. Korgich v. Regents of New Mexico Sch. of Mines, 582 F.2d 549, 551-52 (10th Cir. 1978).
- - - - - - - - - - - - - - - - - -End Footnotes- - - - - - - - - - - - - - -

That Dr. Mascheroni attaches these state law claims to the Title VII complaint under the doctrine of supplemental jurisdiction does not render the Eleventh Amendment inapplicable because the Supreme Court has held that "neither pendent jurisdiction nor any other basis of jurisdiction may override the Eleventh Amendment." <=30> Pennhurst, 465 U.S. at 121. Thus, Dr. Mascheroni may not sue the Board of Regents in federal court absent express waiver of Eleventh Amendment immunity, <=31> Port Authority Trans-Hudson Corp. v. Feeney, 495 U.S. 299, 305, 110 S. Ct. 1868, 1872-[*1560] 73, 109 L. Ed. 2d 264 (1990), or unequivocal Congressional abrogation of the States' Eleventh Amendment immunity. <=32> Dellmuth v. Muth, 491 U.S. 223, 227, 105 L. Ed. 2d 181, 109 S. Ct. 2397 (1989). Inasmuch as Congress has not abrogated the States' Eleventh Amendment immunity against state law claims brought in federal court, and because the Board of Regents has not unequivocally waived immunity, we hold that the Eleventh Amendment bars Dr. Mascheroni's state law [**17] claims against the Board of Regents.

Furthermore, the mere fact that the Board of Regents has appeared in this suit, without explicitly invoking Eleventh Amendment immunity, does not, by itself, constitute a waiver of Eleventh Amendment immunity. The Supreme Court has adhered to a stringent test that waiver of Eleventh

Amendment immunity occurs "'only where stated by the most express language or by such overwhelming implication from the text [of a state statute or constitution] as [will] leave no room for any other reasonable construction.'" Port Authority, 495 U.S. at 305 (quoting <=34> Atascadero State Hosp. v. Scanlon, 473 U.S. 234, 239-40, 87 L. Ed. 2d 171, 105 S. Ct. 3142 (1985)). Accordingly, we have said that a state or arm of the state does not waive Eleventh Amendment immunity merely by appearing in a suit. AMISUB, 879 F.2d at 793 ("The State has not 'expressly stated' by its silence that it has waived Eleventh Amendment immunity."). Accord Richins v. Industrial Construction, Inc., 502 F.2d 1051, 1056 (10th Cir. 1974); see also Atascadero State Hosp., 473 U.S. at 241 (holding that California did not waive its Eleventh Amendment immunity in the California Constitution, absent an explicit statement to that effect).

Because the Eleventh Amendment imposes a threshold jurisdictional bar to Dr. Mascheroni's state law claims brought in the United States District Court for the District of New Mexico, we dismiss and remand with instructions to the district court to vacate its judgment and dismiss for lack of jurisdiction.

III. TITLE VII CLAIM

Dr. Mascheroni next appeals the district court's dismissal of his Title VII cause of action. n6 We review de novo the court's dismissal of Dr. Mascheroni's Title VII claim because "the sufficiency of a complaint is a question of law."

Ayala v. Joy Mfg., 877 F.2d 846, 847 (10th Cir. 1989) (quoting Morgan v. City of Rawlins, 792 F.2d 975, 978 (10th Cir. 1986)). "We will uphold a dismissal [under Fed. R. Civ.

P. 12(b)(6)] only when it appears that the plaintiff can prove no set of facts in support of the claims that would entitle the plaintiff to relief." Jacobs, Visconsi & Jacobs v. City of Lawrence, 927 F.2d 1111, 1115 (10th Cir. 1991). "For purposes of making the foregoing determination, a court must accept all the well-pleaded allegations of the complaint as true and must construe them in the light most favorable to the plaintiff." Williams v. Meese, 926 F.2d 994, 997 (10th Cir. 1991).

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n6 The Eleventh Amendment does not bar our jurisdiction over Dr. Mascheroni's Title VII claim because the Supreme Court has held that Congress expressly abrogated the States' Eleventh Amendment immunity in its enactment of Title VII of the Civil Rights Act of 1964. <=42> Fitzpatrick v. Bitzer, 427 U.S. 445, 456, 49 L. Ed. 2d 614, 96 S. Ct. 2666 (1976).

- - - - - - - - - - - - - - - - - -End Footnotes- - - - - - - - - - - - - - - -

A. Continuing Violation Doctrine The statute of limitations period in Title VII requires precise identification of the occurrence of the "unlawful employment practices." <=43> 42 U.S.C. 2000e-5 [**20] (e); <=44> Delaware State College v. Ricks, 449 U.S. 250, 257, 66 L. Ed. 2d 431, 101 S. Ct. 498 (1980). Dr. Mascheroni attempts to comply with this rule by relying on the continuing violation doctrine, which "permits a Title VII plaintiff to challenge incidents that occurred outside the statutory time limitations of Title VII if such incidents are sufficiently related [to events occurring within the time limitations period] and thereby constitute a continuing pattern of discrimination." <=45> Hunt v. Bennett, 17 F.3d 1263, 1266 (10th Cir. 1994). The Supreme Court discussed the continuing violation doctrine in <=46> Havens Realty Corp. v. Coleman, 455 U.S. 363, 71 L. Ed. 2d

214, 102 S. Ct. 1114 (1982), where it examined numerous [*1561] allegations of a realtor's unlawful "racial steering."

The Supreme Court, however, has tempered an expansive treatment of the administrative statute of limitations with reminders of the necessary objectives of setting time bars. For instance, in Ricks, the Court observed that limitations periods attempt to "protect employers [**21] from the burden of defending claims arising from [distant] employment decisions." <=47> Ricks, 449 U.S. at 256-57. There, the plaintiff had first been denied tenure, and thereafter was terminated. Notwithstanding that the ultimate loss of employment followed a decision not to grant tenure, the Supreme Court held that the plaintiff could not use the later date of termination to reach the alleged discriminatory act of denial of tenure. The Court said,

Mere continuity of employment, without more, is insufficient to prolong the life of a cause of action for employment discrimination.

. . .

. . . [This] is so even though one of the effects of the denial of tenure -- the eventual loss of a teaching position -- did not occur until later. . . . "The proper focus is upon the time of the discriminatory acts, not upon the time at which the consequences of the acts became most painful."

Id. at 257-58 (quoting Abramson University of Hawaii, 594 F.2d 202, 209 (1979)); accord Chardon v. Fernandez, 454 U.S. 6, 8, 70 L. Ed. 2d 6, 102 S. Ct. 28 (1981) (per curiam) (applying Ricks to 42 U.S.C. 1983 actions). However, Ricks does not provide specific guidelines to distinguish between the occurrence of a "discriminatory act" and a later "consequence."

We have held that a Title VII plaintiff may recover for discriminatory acts occurring prior to the statutory limitations period if at least one instance of the discriminatory practice occurs within the filing period and the earlier acts are "part of a continuing policy or practice that includes the act or acts within the statutory period." Martin v. Nannie and the Newborns, Inc., 3 F.3d 1410, 1415 (10th Cir. 1993); see also Furr v. AT & T Technologies, Inc., 824 F.2d 1537, 1543 (10th Cir. 1987) (explaining that the various acts must constitute a "continuing pattern of discrimination"). The discriminatory act occurring within the time period need not constitute a legally sufficient Title VII claim in itself. Martin, 3 F.3d at 1415 n.5. However, the plaintiff cannot simply assert that "acts [occurring] outside the required time limit had a continuing effect within the statutory time allowed for suit." <=55> Id. at 1415; <=56> United Air Lines v. Evans, 431 U.S. 553, 558, 52 L. Ed. 2d 571, 97 S. Ct. 1885 (1977) (stating the critical question as not whether past practices have current consequences, but whether "any present violation exists").

Thus, to establish a continuing violation, Dr. Mascheroni must allege that his employer engaged in a series of related discriminatory acts, at least one of which falls within the limitations period. <=57> Purrington v. University of Utah, 996 F.2d 1025, 1028 (10th Cir. 1993). To determine whether the alleged incidents of discrimination constitute a continuing violation or are discrete unrelated acts, we employ a three-factor inquiry: "(i) subject matter -- whether the violations constitute the same type of discrimination; (ii) frequency; and (iii) permanence -- whether the nature of the violations should trigger an employee's awareness of the need to assert her rights and whether the consequences of the act would continue even in the absence of a continuing intent to

discriminate." Martin, 3 F.3d at 1415.

Dr. Mascheroni's second amended complaint alleged discriminatory treatment in two instances: (1) transfer from his initial position, purportedly due to a RIF; and (2) suspension of his security clearance arising from his supervisors' allegations of security breaches. He further alleges that the allegations of security violations ultimately led to his dismissal from the Los Alamos National Laboratory. The two allegedly discriminatory acts occurred outside the statutory time period for filing with the New Mexico Human Rights Commission (i.e. in excess of 300 days before Dr. Mascheroni filed his complaint [*1562] with the Commission on August 3, 1988). n7 While the third act occurred within the filing period, the court found that Dr. Mascheroni did not allege sufficient facts to create a prima facie case of discrimination solely on the latter termination. The court declined to expand Dr. Mascheroni's filing window to include previous acts based on the continuing violation doctrine and thus granted the Board of Regents' motion to dismiss.

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n7 Dr. Mascheroni filed his Title VII complaint on August 3, 1988. However, his initial RIF and transfer occurred in March 1987, and the allegations of security breaches preceded the DOE's suspension of his security clearance in September 1987.

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At oral argument, counsel for Dr. Mascheroni conceded that Dr. Mascheroni's ultimate termination from the Los Alamos National Laboratory in March 1988 -- the only event that falls within the 300-day filing period -- did not violate Title VII, nor was it an act of discrimination based on his national

origin. Instead, he explained that the termination occurred as a result of budget limitations. Because the termination was perceived as non-discriminatory, Dr. Mascheroni challenged this termination as a discrete actionable event only as a state law claim. For purposes of the Title VII claim, he rests solely on the supposition that the termination was a "predictable result" of prior discriminatory acts and thus should extend the time limitations period under the "continuing violation" doctrine.

Inasmuch as Dr. Mascheroni fails to identify a discriminatory act that occurred within the statutory time period and that was part of a continuing violation, he cannot satisfy the first prong of our test. Although the subsequent act need not be actionable in its own right, it must be an act of discrimination or it cannot share commonality with the preceding acts on the most important characteristic of all -- that the acts are related acts of discrimination. Hence, Dr. Mascheroni has failed to show a continuing violation that includes at least one act of discrimination within the time allowed for suit.

B. Equitable Tolling

Dr. Mascheroni argues, in the alternative, that the district court should have equitably tolled the charge-filing period due to alleged deceptive conduct of Laboratory supervisors.

We have explained that the time limits in Title VII "will be tolled only if there has been 'active deception' of the claimant regarding procedural prerequisites." Scheerer v. Rose State College, 950 F.2d 661, 665 (10th Cir. 1991), cert. denied, <=60> 120 L. Ed. 2d 872, 112 S. Ct. 2995 (1992); Zipes v. Trans World Airlines, Inc., 455 U.S. 385, 398, 71 L. Ed. 2d

234, 102 S. Ct. 1127 (1982). A claimant who is aware of his Title VII rights, however, is obligated to file promptly or forfeit his claim. <=62> Purrington, 996 F.2d at 1031.

In his attempt to demonstrate actual deception, Dr. Mascheroni alleges that Los Alamos National Laboratory human resources personnel encouraged him to exhaust all administrative processes and internal grievance mechanisms before filing a Title VII complaint. He also points to supervisors' misrepresentations concerning the Laboratory's efforts to revive his security clearance. n8 And he suggests that a "laboratory culture that avoids outside scrutiny and bristles at outside interference in internal affairs" further pressured him to continue to work within the organization to resolve his differences. n9

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n8 Dr. Mascheroni does not appeal the district court's dismissal of his claim to seek reinstatement of the security clearance. Instead, he presents the allegations of security violations as "further evidence" of discriminatory treatment.

n9 At oral argument, counsel for Dr. Mascheroni argued that he was further dissuaded from filing a Title VII complaint because his funding proposal for a hydrogen fluoride laser project was still under consideration by Los Alamos National Laboratory management. However, Dr. Mascheroni fails to allege how the management's pending consideration of his funding proposal misled him as to the grounds or procedures required to commence a Title VII claim. <=63> Scheerer, 950 F.2d at 665.

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Accepting as true Dr. Mascheroni's allegations, we conclude

that the district court properly refused to equitably toll the charge-filing period. Dr. Mascheroni knew of the [*1563] allegedly false and potentially discriminatory reasons for his initial RIF and allegations of his security breaches more than one year before he was dismissed. Comments by the security division leader and the human resources department may have given him false hope that his problems could be resolved internally, but they do not rise to the level of active deception about the procedures for filing a Title VII claim that we articulated in Scheerer, 950 F.2d at 655, and Wilkerson v. Siegfried Insurance Agency, 683 F.2d 344, 348 (10th Cir. 1982) (the evidence must establish either active deception about the procedural prerequisites of Title VII or that the plaintiff "has in some extraordinary way been prevented from asserting his or her rights"). n10 Merely alleging business reasons or a corporate culture that discouraged him from suing promptly does not state a basis for invoking the equitable tolling doctrine. Accordingly, we affirm the court's dismissal of Dr. Mascheroni's Title VII claim as untimely.

----------Footnotes----------

n10 Dr. Mascheroni originally argued that his claims were tolled by the internal grievance filing, but he does not make that argument before this Court. But even if such a claim were asserted on appeal, it would be without merit. Ricks, 449 U.S. at 261.

----------End Footnotes----------

IV. CONCLUSION

We DISMISS Dr. Mascheroni's state law claims and REMAND with instructions to the district court to VACATE its judgment and dismiss for lack of jurisdiction over such claims. We AFFIRM the court's dismissal of the Title VII

claim. n11

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n11 We DENY the Appellant's motion to certify to the New Mexico Supreme Court the question of the applicability of the New Mexico Tort Claims Act, and we DENY the Appellees' motion for leave to file "Notice of Modification of Representations at Oral Argument."

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FILED DEC 14 1992

UNITED STATES DISTRICT COURT
ALBUQUERQUE, NEW MEXICO

FOR THE DISTRICT OF NEW MEXICO

PEDRO LEONARDO MASCHERONI,

Plaintiff,

VS.

BOARD OF REGENTS OF THE UNIVERSITY OF CALIFORNIA, et al.,

Defendants.

No. CIV 91-399 JC/RWM

ENTER ON DOCKET

MEMORANDUM OPINION

THIS MATTER came on for consideration of the Defendant's Motion to Strike and Dismiss, filed May 28, 1992. The Court has reviewed the motion and the memoranda submitted by the parties. The Court finds that the motion is well-taken and will be granted. As a result, the defendants' Objections to Magistrate's Order for relief from a stay of discovery will be denied as moot.

When reviewing a motion to dismiss under Rule 12(b)(6) of the Federal Rules of Civil Procedure, the Court

"must accept as true the plaintiff's well-pleaded factual allegations and all reasonable inferences must be indulged in favor of the plaintiff." Shaw v. Valdez, 819 F.2d 965, 968 (10th Cir. 1987). A motion to dismiss will be granted only if "it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief." Shoultz v. Monfort of Colorado, Inc., 754 F.2d 318, 321 (10th Cir. 1985).

The present motion to dismiss is premised upon plaintiff's alleged failure to comply with the procedural prerequisites for bringing this Title VII claim. Title VII provides that "[a] charge ... shall be filed (with the EEOC] within one hundred and eighty days after the unlawful employment practice occurred." 42 U.S.C. ñ 2000e-5(e)(l). The 180-day requirement is extended to 300 days in a deferral state such as New Mexico where the charge may be initially filed with the state's Human Rights Commission. Id. "A timely filing with the EEOC is a prerequisite to a civil suit under ... Title VII. Aronson v. Gressly, 961 F.2d 907, 911 (loth Cir. 1992).

The essence of the Second Amended Complaint is that adverse employment actions were in fact "continuing efforts of Los Alamos... to silence Plaintiff and get plaintiff out of Los Alamos and out of ICF research entirely." Response Brief at 5. As in his previous pleadings, Mascheroni asserts that his advancement of certain scientific theories were negatively

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1 Although the pleading is entitled "Second Amended Complain. for Civil Rights Violations and Tortious Discharge in Violation of Public Policy", any state claims were previously dismissed with prejudice aand will be stricken from the pleading. See Orders filed April 15 and July 17, 1992.

received by his superiors in part because he is a hispanic of Argentinean birth. Mascheroni alleges that several actions taken by the defendant employer constituted disparate treatment in violation of Title VII.[1] Specifically, he identifies as actions constituting disparate treatment: (1) the loss of his position in X-Division during a reduction-in-force ("RIF"); (2) the suspension of his security clearance; and (3) termination from his position from N-Division.

Plaintiff contends that the time for filing his administrative charge 11start[ed] to run only upon his termination from employment: that is March 16, 1988.11 Response Brief at 6. His charge was filed with the New Mexico Human Rights Commission 140 days after this date. Because plaintiff did not file an EEOC charge within 300 days of either his RIF termination from XDivision or the suspension of his security clearance, I previously found that these adverse actions cannot form the basis for a viable Title VII Qlaim. See Order filed April 15, 1992.[2]

Of the alleged discriminatory actions pled in the First Amended Complaint, only the termination from N-Division was within 300 days of the filing of his EEOC charge. However, the First Amended Complaint did not allege that this separation from employment violated Title VII. Thus, I permitted plaintiff to file a Second Amended Complaint to clarify the allegations relating to his termination from N-Division in March 1988. See order filed April 15, 1992.

Mascheroni now alleges that his termination from N-Division was "caused by Defendants' continuing discriminatory assertions of security violations through March 1988.11 Second Amended Complaint at 146. By characterizing the security violation allegations as

"continuing", plaintiff attempts to circumvent his failure to file a timely EEOC complaint charging discrimination in the September 1987 suspension of his 'IQ" security clearance. Plaintiff further seeks to expand his claim for "continuing" violations to include not only the removal from N-Division and suspension of his clearance, but the earlier 1987 termination from X-Division as well.

Applying a "continuing" violation label to such discrete events would defeat the purposes underlying the filing of a timely charge. Moreover, plaintiff alleges that his termination from N- Division resulted from the allegations of security violations which ultimately led to suspension of the 'IQ" security clearance. The time for filing a complaint of discrimination starts to run at the time of the discriminatory act, not when the action results in negative consequences for the employee. See Delaware State College v. Ricks, 449 U.S. 250, 256-58 (1980) ("alleged discrimination occurred--and the filing limitations periods commenced--at the time the tenure decision was made and communicated.... That is so even though one of the effects of the denial of tenure--the eventual loss of a teaching position--did not occur until later").

Moreover, to the extent that an inquiry into the actual reasons and merits of a decision for suspension of the security clearance would be required, this Court has grave reservations of its authority to second-guess the decision of the executive branch. See Department of Navy v. Egan, 484 U.S. 518, 528-32 (1988). The Tenth Circuit has cautioned that

> [i]f the merits underlying a revocation [of a security clearance] cannot be examined, there

> are even stronger reasons why the merits underlying an interim action such as a suspension cannot be examined.... if the statutory constraints imposed in Egan can be bypassed simply by invoking alleged constitutional rights, it makes the authority of Egan hardly worth the effort.

Hill v. Department of Air Force, 844 F.2d 1407, 1411 (10th Cir. 1988). similarly, it seems doubtful that Mascheroni's invocation of statutory civil rights under Title VII could form the independent jurisdictional basis for reviewing modification of his security clearance that was found lacking in Hill.

Plaintiff also attempts to invoke "equitable tolling" to excuse his failure to file a timely charge of discrimination. He contends that the "laboratory culture" induced him not to file a charge, but to seek to resolve the dispute internally. The Second Amended Complaint makes it clear that plaintiff was aware of the Title VII procedures available to him and consciously chose not to pursue that remedy in a timely manner. In the absence of "active deception" by the employer as to the charge filing process, equitable tolling is not available. See Scheerer v. Rose State College, 950 F.2d 661, 665 (10th Cir. 1991).

Finally, the defendants correctly point out that plaintiff fails to allege the typical prima facie case for a Title VII claim of discrimination with regard to the N-Division termination. Mascheroni does not assert that a similarly situated non-hispanic employee retained employment with the Lab or that he was replaced by a less qualified non-hispanic. For all of the above reasons, the Second Amended Complaint will be dismissed with prejudice.

An order in accordance with this opinion shall be entered.

John E. Conway
UNITED STATES DISTRICT JUDGE

FILED APR 15 1992

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF NEW MEXICO

PEDRO LEONARDO MASCHERONI,

Plaintiff,

No. CIV 91-399 JC/RWM

VS.

BOARD OF REGENTS OF THE UNIVERSITY OF CALIFORNIA, et al.,

Defendants.

ENTERED ON DOCKET

ORDER

THIS MATTER came on for consideration of the defendants' motion to treat their 12(b) defenses as a motion to dismiss. The court, having reviewed the memoranda of the parties and the applicable law, having heard oral argument at a hearing on Tuesday, April 14, 1992, and being otherwise fully advised in the premises, finds that the motion is well-taken and will be granted.

Wherefore,

IT IS ORDERED, ADJUDGED AND DECREED that:

1. Plaintiff's state law claims be, and hereby are, dismissed with prejudice;

2. Plaintiff's Title VII claim be, and hereby is, dismissed;

3. Plaintiff is granted until April 27, 1992 to file an amended complaint with respect to his Title VII claim and any other claim not heretofore dismissed with prejudice.

John E. Conway
UNITED STATES DISTRICT JUDGE

FILED APR 27 1998

IN THE COURT OF APPEAL
OF THE STATE OF CALIFORNIA
FIRST APPELLATE DISTRICT
303 SECOND STREET, SOUTH TOWER
SAN FRANCISCO, CA 94107
DIVISION 4

PEDRO LEONARDO MASCHERONI,
Plaintiff and Appellant,

v.

REGENTS OF THE UNIVERSITY OF CALIFORNIA, et al.,

A078918
Alameda County No. 6752239

BY THE COURT:

The petition for rehearing is denied.

Date: Apr 27 Poche, Acting P.J.

FILED AUG 12 1992

COURT OF APPEAL OF THE STATE OF CALIFORNIA
IN AND FOR THE
FIRST APPELLATE DISTRICT
DIVISION 4

MASCHERONI, PEDRO LEONARDO
vs.
REGENTS OF THE UNIV. OF CALIFORNIA ET AL
A054464
Alameda County No. 6752239

BY THE COURT:

The petition for rehearing is denied.

Dated: [AUG 12 1992]

[ANDERSON] P.J.

FILED JUL 17 1992

UNITED STATES DISTRICT COURT
ALBUQUERQUE, NEW MEXICO

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF NEW MEXICO

PEDRO LEONARDO MASCHERONI,

Plaintiff,

VS.

BOARD OF REGENTS OF THE UNIVERSITY OF CALIFORNIA, LOS ALAMOS NATIONAL LABORATORY,

Defendants.

No. CIV 91-399 JC/RWM

ENTERED ON DOCKET

ORDER

THIS MATTER comes on for consideration of the plaintiff's Motion for Amendment of Order, filed April 30, 1992. The Court, having reviewed the memoranda of the parties and the applicable law, and being otherwise fully advised in the premises, finds that the motion is not well-taken and will be denied.

Following a hearing on the defendants' motion to dismiss, this Court entered its order dismissing the plaintiff's state law tort and contract claims with prejudice on April 16, 1992. The plaintiff moves this Court to amend its order so that the dismissal is without prejudice.

In ruling on the defendants' motion to dismiss, the Court determined that, under New Mexico law, these defendants are entitled to the same-immunities as are available to New Mexico state entities. See Padilla v Pueblo of Acoma, 107 N.M. 174, 179 (1988), and Bartels v. Hecke , No. CIV 90-125 SC (D.N.M. November 29, 1990). Therefore, the Court concluded that the plaintiff could not state a claim in tort or contract against these defendants. The plaintiff's tort claims are barred by the New Mexico Tort Claims Act, §§ 41-4-1 et seq. The plaintiff's contract claims are barred by the statute of limitations applicable to contract claims against state governmental entities. See N.M.S.A. ñ 37-1-23. The Court's decision is a ruling on the merits and the plaintiff's state claims were therefore appropriately dismissed with prejudice.

Wherefore,

IT IS ORDERED, ADJUDGED AND DECREED that plaintiff's Motion for Amendment of Order be, and hereby is, denied.

DATED: July 16 1992.

UNITED STATES DISTRICT JUDGE

FILED JUL 18 1991

SUPERIOR COURT OF THE STATE OF CALIFORNIA
IN AND FOR THE COUNTY OF ALAMEDA

PEDRO LEONARDO MASCHERONI
vs-
REGENTS OF THE UNIVERSITY OF CA.

CLERK'S NOTICE in re RULING Action No. 675223-9

In the above entitled action pending in Department 19, you are hereby notified that plaintiff's motion to modify or dissolve Order of Stay is denied.

Counsel notified by mail.

Date July 18, 1991

RENE C. DAVIDSON, County Clerk
By: [PHIL SEOANE]
Deputy

FILED JUN 23 1997

SUPERIOR COURT OF CALIFORNIA

COUNTY OF ALAMEDA

PEDRO LEONARDO MASCHERONI,
Plaintiff,
vs.

THE REGENTS OF THE UNIVERSITY OF CALIFORNIA,
Defendant.
_____ _____/

No. 675223-9

JUDGMENT OF DISMISSAL

On April 17, 1997, this Court issued an Order sustaining, without leave to amend, the demurrer of defendant The Regents of the University of California as to all seven causes of action pleaded in plaintiff's First Amended Complaint. (A Copy of such Order is attached hereto as Exhibit A.)

Pursuant to California Code of Civil Procedure Section 581(f)(1), IT IS HEREBY ORDERED that this action is DISMISSED in its entirety, with prejudice, and defendant is awarded its costs.

DATED: Jun 23 1997

Nancy A. Remmert
JUDGE OF THE SUPERIOR COURT

FILED APR 17 1997

IN THE SUPERIOR COURT
OF THE STATE OF CALIFORNIA

IN AND FOR THE COUNTY OF ALAMEDA

PEDRO MASCHERONI,	)	No. 675223-9
Plaintiff	)	ORDER AFTER HEARING
vs.	)	
REGENTS OF UC, et al,	)	ON 4-17-97
Defendant	)	

This matter came on calendar on April 17, 1997 at 9:15 am in Dept. 81. The Court, having taken the matter under submission, now rules as follows: The tentative ruling is affirmed. The general demurrer to the 1st cause of action is SUSTAINED WITHOUT LEAVE TO AMEND as it is time-barred. Demurrers to 2nd-7th causes of action SUSTAINED WITHOUT LEAVE TO AMEND for failure to allege exhaustion of Judicial remedies. See *Swartzendruber v. City of San Diego* (1992) 3 Cal App 4th 896.

Date APR 17 1997

Sandra Margulies
JUDGE SANDRA MARGULIES

IT IS SO ORDERED.

S-2 EXHIBIT A

Special Report

to

The Inspector General, DOE

on

Dr. P. L. Mascheroni's "Q" Access Authorization

by

DOE Los Alamos Area Office

November 21, 1991

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Special Report 1

Determination and Recommendation 53

Special Report on Dr. P. L. Mascheroni's "IQ" access authorization

On this date, November 14, 1991, the DOE IG, Ms. Elise Ennis, requested all the dates we could remember that would help her to do an Inspector General's review of Dr. Pedro Leonardo Mascheroni's 'IQ" access authorization processing.

In March 1988, I was requested by DOE Manager Harold Valencia to be in charge of Mascheroni's clearance. In the 1970's I worked at DOE Headquarters Inertial Fusion Office in the area of security. I knew that each laboratory was pursuing a technology for fusion. For example, LLNL was pursuing glass lasers, a low efficiency, short wavelength technology, and LANL was pursuing gas lasers, a high efficiency, longer-than-glass wavelength technology. All the labs were supposed to evaluate their technology for fusion. During the course of my investigation, I read Mascheroni's security file which included the OPM investigation and related documentation. The documentation was reviewed in grievance hearings it the Lab, including job assignments and evaluations, a determination from the New Mexico Department of Labor/Human Rights, the report and recommendation from the Grievance Hearing Officer, etc. In addition, I have informally questioned a rather large number of scientists on aspects of the case. Among those who I interviewed are Drs. Marvin Mueller, Chuck Mansfield, Claude Phipps, Erick Lindman, Ray Kidder, Greg Canavan, Doug Wilson, and George York. I have also spoken with several members of the NAS ICF review panel by phone. I have formally questioned Mascheroni on several occasions. I have read his grievance and LANL management's response. I

have studied the LANL Human Resources determination. I have read a significant portion of the testimony to Prof. David Feller, the UC law professor who was the Hearing Officer for the grievance. I have read the grievance filed with New Mexico Human Rights and the determination. I have read the Mascheroni and LANL briefs to Feller and Feller's recommendation. I have read some pertinent parts of the report from the 1990 National Academy Panel that reviewed the ICF program. I have also confiscated a report by Mascheroni submitted to the NAS Panel and referee's, and review it. In November 1990, I wrote a summary memo to Mr. J. Bellows, DOE-LAAO Manager, with my evaluation and recommendation. I have also informally inspected the Laboratory. [There is an appendix to this report with the documentation used to reach my determination and recommendation.]

Dr. Pedro Leonardo Mascheroni began his employment with Los Alamos National Laboratory on August 20, 1979. His 'IQ" clearance was approved in October 1979.

There are two LASL Employee performance evaluations for [2] period 1979-May 1982. In 1979, Mascheroni was assigned to design targets for the laser facility, Antares (and ICF), using LASNEX and other codes. His first supervisor was Dr. Erick Lindman, section leader. His group leader was Dr. J. Kindel. Mascheroni proposed an ICF reactor target, ARGUS, that would operate with C02 in the long pulse multiline broad band regime. Mascheroni's memos stated that in about 1981-1982 the C02 laser had scientific show stoppers and would not work for fusion applications in the single-line, short pulse mode; but that C02 could work in the

broad-band, multiline, long pulse mode where Antares was going to operate.

There is document by DOE about ICF funding issued around 1981 covering FY79-FY86. C02 laser development and experiments are projected to be funded until FY86 in this FY 82-FY 86 5-year energy program. There is also a LLNL viewgraph: 11 Based on 19791982 efforts, LLNL judged the potential of KrF drives to be marginal for ICF.11

In 1979-1980, Dr. Greg Canavan came from DOE and started a KrF effort with the object of exploring the KrF laser technology, with no plan for making a target shooter from this laser effort.

In March 1983, Dr. George Spillman, et al, wrote the evaluation of C02 using Helios in the single-line, short pulse mode. Spillman, et al, recognized the show stoppers for C02 in this regime.

In July 22-28, 1983 memos, Dr. William Mead announces that there is a KrF Working Group with the objective of building a KrF Aurora target shooter. Mead was hired from LLNL by Kindel and was later appointed X-1 section leader. There is evidence that DOE was not funding this KrF effort. At Mascheroni's grievance hearings it became clear that this effort was unfunded, but was approved by Kindel.

In August 1983 there is a LANL report entitled "Antares Project High Energy Gas Laser facility," which is a DOE-LANL document with signatures of high level management up to the Assistant Secretary for Defense

Programs. The document states the reasons for pursuing high efficiency lasers and that Antares will accomplish the completion of the evaluation of C02 in the long pulse and other regimes. In FY83, there was some funding for KrF technology, i.e. just the laser source. However, there was no funding for a KrF target shooter, i.e., after the laser is functional, then it is prepared to shoot targets to study the laser target interaction. The priority was clear, to complete the evaluation of C02 with Antares in all the regimes, including multiline long pulse. This was projected for up to FY86. In [3] Antares, a long pulse is necessarily multiline.

Memos for August 8-12, 1983, from Dr. John Browne, P-Division leader, who was in charge of lasers states: "In order to facilitate the transition from a construction to the operation phase, the Antares Transition Committee is established," and 11 1 expect there to be one KrF project in P-Division effective immediately. For us to be successful ... I expect everyone in P Division to give Reed Jensen (the new manager) full cooperation."

On September 29, 1983 there is a memo from G. Spillman, "A Basis for an Antares Experimental Program." This memo used the recommendation from an outside panel composed by Profs. H. Griemm, F. Perkins, Dr. C. Longmire, etc., to establish that the first priority was to evaluate C02 in all the regimes with Antares.

From September 30, 1983, Dr. G..Spillman's viewgraphs to the Antares Working Group: "A Basis for an Antares experimental program." Spillman was-a high level manager at LANL. This is a detailed document where it is clear what the

goals and priorities are for LANL. First is "Complete C02 Evaluation Base." "First job is C02 evaluation." "Need to establish predictability" (a Mascheroni goal judging from his evaluations). Evaluate "Long Pulse Coupling". . ..Spillman addresses the panel's responses. This was an external panel appointed by LANL with members from The University of Maryland, Princetown. "Pursue most promising options." They recommended experiments in the long pulse, multiline, broad-band regime.

On October 11, 1983 another Spillman addition where "Complete C02 Evaluation" is first priority, with distribution to the Antares Working Group, where Mascheroni was.

On February 16, 1984, a trip report to Distribution was filed describing Mascheroni's visit to Argentina January 13-26, 1984. T. Hirons, Mascheroni's supervisor at the time is on this distribution. The trip was made due to illness in Mascheroni's family. Hirons suggested Mascheroni sick leave and that he talk to DOE for permission. Mascheroni talked to DOE, and was instructed that because the trip was not being paid by DOE, no paperwork was required. It was suggested that he might, as a courtesy--not a requirement, write a trip report when he returned. DOE suggested he talk to Rockwood, the ICF boss at LANL. Rockwood suggested he talk to Jensen who had visited Argentina. The trip report is a rather detailed 5-page report with distribution to anyone who may have an interest: IND/INT, X-Division, Associate Director for Physics and Math, National Security Programs/Inertial Fusion, X1., etc. After the trip R. [4] Vroman visited Mascheroni to discuss his report which was then classified.

Special Report

On February 13, 1984, there is a detailed job evaluation signed by Dr. Thomas Hirons, Deputy Associate Director for Physics and Mathematics, covering the period May 1982- Feb 1984. Mascheroni's research work was reviewed by a group of scientists. In Feb. 1984, his evaluation was written by then Deputy Division Leader for X-Division, Dr. Tom Hirons. This was the first review by a group of scientists of what was to become the proposal for a Hydrogen Fluoride Laboratory Microfusion Facility. The review group included scientists from LANL and Livermore. The evaluation stated that Los Alamos should put attention toward Mascheroni's 'work which showed predictability for some ICF experiments and that predictability for experiments could be significantly improved. Because Mascheroni also worked on modeling KrF, the review included C02 and KrF laser interactions. Mascheroni predicted that the scientific situation for high efficiency lasers would improve significantly in a new regime that was (supposed) to be reached in the Antares Facility. To make those predictions Mascheroni did not use fudge parameters, but improved physics in the codes, a process which he called "code validation physics."

The documentation shows that there was no DOE funding for the KrF target shooter theory to be pursue in X-1 at that time. DOE funding was allocated to finish the C02 evaluation with Antares, which was what Mascheroni was doing. Mascheroni had predicted that in the long-pulse, multiline regime the Antares coupling physics would improve significantly. Kindel and Forslund were of the opposite opinion.

In March 1984, after Hirons' evaluation of Mascheroni's work, Kindel assigned Mascheroni to work for Dr. Doug

Wilson on a task that had nothing to do with Antares evaluation. Wilson, a section leader in X-1 who was leaving to join the ICF Program Office, wanted to stop Mascheroni's work in Antares-related physics. on June 17, 1984 Mascheroni writes to Wilson: "Last Monday you informed me that Kindel had asked you to write my evaluation for the past year. I told you that my evaluation had been prepared by Tom Hirons for the period up to 2/13/84, and that you should have been my supervisor from ... The following is a brief resume of our last meeting... (1) I requested information pertaining to the ICF reactor target which, I presume, has been giving the sense of direction to the program. (2) I reminded you that you were present in two of my seminars (in 1980 and 1981) in which I discussed my concept (Argus) for a reactor target for C02 ... (3) I reminded you that in about November 1981, you explained to a large staff audience in the Plutonium Facility that we were not [5] afraid of hot electrons. You proceeded to describe a target driven by 500 KeV electrons. This blatantly disagreed with Argus [a target that could be studied with Antares long pulse) as well as the present evaluation of C02 ..."

On April 1984, Dr. David Cartwright was appointed ICF Program manager. He testified that he was the Principal Program manager for ICF at LANL since his appointment.

Dr. Marvin Mueller, formerly of group P-4, in charge of ICF experiments, testified to Feller, and it is in his memo of June 30, 1987 about ICF, that during late 1983-1986 his group leader, Dr. Phil Goldstone, opposed completing the evaluation for C02 and supported the KrF Aurora target shooter effort. A fact that he made explicit in group meetings.

Dr. Chuck Mansfield, also a manager in charge of the Antares laser system, testified that during 1984-1986, "Nearly all attempts to make the Antares system perform to specifications were blocked by management (Goldstone Hauer, Jensen, Cartwright)." He also stated: "Phil Goldstone told me "The decision was made that since Antares was dropped on us by the NAS that we will apply only the minimum and do only those experiments which would allow us to make a credible argument to NAS that we had evaluated C02 as a driver." By this statement the philosophy is revealed, it was assumed a priori that Antares would not work and that only a token effort would be made with experiments --This philosophy is the antithesis of scientific integrity."

On April 11, 1984, D. Cartwright writes the "guidelines for ICF two-year plan, FY 19861987.11 From these guidelines, it is clear that there is Antares funding to complete the evaluation of C02 for just FY 85. "Beginning in FY 1986 the Los Alamos ICF program will be composed of the following three major components: ..Aurora and Polaris.." but no funding for any C02 activity for FY86.

On January 18, 1985, Kindel wrote a memo to X-DO. "This memorandum indicates my support for an interim raise of 10% for Leo Mascheroni. The issue is one of alignment and performance ... Leo has exhibited an effort much beyond the call of duty in his quest to understand laser target interaction physics in a self-consistent manner. I learned that he spent the week before the plasma meeting of the APS (October in Boston) at work 18 hours a day in his research efforts. He managed to carry out a difficult two-dimensional self-consistent LASNEX calculation of a KrF target using the

Ray Trace package in LASNEX with many of the physics additions which Leo developed. Leo has argued that an electromagnetic turbulence plays an important role in high intensity under dense plasma absorption. Work, which Forslund, [6] Mori and I have recently performed gives credence to his suggestion. The light wave becomes stochastic (turbulent) above some intensity in the underdense plasma, whereas, we had previously attributed the simulation effects as due only to Raman instabilities." Which clearly reveals that Mascheroni was working also in KrF target physics, and was improving the LASNEX code physics. At the end of 1984, Kindel had decided that Mascheroni should work directly under him.

It may be useful to note that testimony by Kindel to UC Hearing Officer Prof. Feller, acknowledges that he misranked Mascheroni due to a scientific conflict and that he did not correct this. Finally, in the 1985 job assignment, Kindel acknowledges that Mascheroni was correct in his predictions for Antares while he (Kindel) and David Forslund were not. Dr. Forslund was a leading computer physicist in X-Division leading the ICF effort. Kindel backed Mascheroni and Mueller for the continuation of the Antares experiments, because he recognized that C02 should be evaluated in the long pulse regime. In 1986, he participated in a meeting with Deputy Director Warren "Pete" Miller and Mascheroni, Mansfield, and Mueller showing his support for the evaluation of Antares in the long pulse regime. C02 was the funded program, but it is clear that the X-1 management ranked KrF much higher in priority than C02 during 1984-1985. The Aurora target shooter program was as yet not funded.

On March 28, 1985 Congressman Davis requests information about the NAS review of ICF from NAS President Frank Press.

On April 22, 1985 there is a response from President Press. There we learn that the NAS panel will be at LANL on May 14-15. "As you may know the committee has thus far held one meeting (March 4-5) that provided a very comprehensive overview of the entire ICF program... "

On May 1, 1985 Program Director Cartwright informs LANL staff that the NAS review is on.

The LANL ICF meeting to the NAS on May 14-15 was repeated on June 18, 1985. The presentations were: overview by Cartwright; capsule physics by Mead; Centurion by Sandford; material technology by Mah; Driver Technology by Jensen; driver-matter interaction explaining the C02 laser plasma interaction by Goldstone; and a summary by Cartwright. Mansfield was present the NAS meeting. On May 15, 1985, Mueller's group leader (Dr. P. Goldstone) reported Mueller's results to the 1985 NAS ICF review panel indicating that they were not sufficiently conclusive to merit continuation of the Antares experiment. Mascheroni, Mueller, Mansfield (and later many others) found [7] Goldstone's interpretation of the experimental results to be grossly incorrect. In late 1984, Goldstone had made it clear to Mueller, Mansfield, and others, that management wanted the KrF Aurora program to advance and a very low level of work--just enough to satisfy the Academy--on C02. On the other hand, the DOE Document (of August 1983) about the ICF program, clearly indicates that the C02 evaluation was a

DOE priority until FY1986.

May 28, 1985, Cartwright gave a summary of the May 23, 1985 meeting which addressed long pulse results. "Mueller requested a third oscillator which he feels would take 3-4 weeks off-line in order to lengthen the pulse ... Mueller requested 12 short pulse experiments and 10 long pulse experiments with improved pulse shape (3rd oscillator). Mansfield says it would take 2-3 shots per day, and at least 10 days." Cartwright states: "At the next meeting (we) need to decide which of the proposed experiments using long pulses should be completed." The fact is that in May 1985, Dr. Marvin Mueller and his crew obtained preliminary experimental results that validated Mascheroni's theory. Mueller states that much work is needed to understand the new, time-resolved results. Mueller requests 6 weeks of additional experiments with Antares.

On June 19, 1985 Cartwright states: "The [Antares] system needs refurbishing. Mansfield has two detailed options for running Antares ... Mueller has nearly finished the short pulse experiments and when the scheduled shutdown takes place, he will have enough data to work with X-1 and try to develop a model of what is happening ... Antares will go for refurbishing on Monday, June 24 and not be available until 15 September. 1985."

From May 1984 to May 1985, Kindel evaluates Mascheroni's work. "Leo's job assignment during the past review period has been to calculate long and short wavelength experiments using the "Code Validation Physics" approach. This will involve considerable code development activities in working

with the LASNEX team...A major accomplishment ... was a confirmation of Leo's prediction. In April 1984, D. Bach of P-4 reported experimental results from Livermore's more recent (at that time) 4 w[(same wavelength as KrF] shots ... Leo had predicted in his presentation to the ECLIM meeting in London in the fall of 1983, (60% vs 58% conversion efficiency) described in Leo's report. Using LASNEX Leo did calculations for a KrF laser striking a gold target. These very time consuming 2-D calculations .... In the latter half of this review period the ..execution of Mueller's long pulse experiments on ANTARES capture Leo's attention/. Based on theoretical arguments and WAVE runs Leo has predicted different hot electron regimes depending on how far from local [8] quasi equilibrium, the system may be. Leo has suggested that ... For Antares Thot should go down in the long pulse regime when ,compared with the short pulse regime ... Dave Forslund and I had thought just the opposite would occur. The first long pulse ANTARES experiments {Mueller's} in Spring 1985 where the laser struck a small ball-target showed Leo's predicted effect. Two papers ..were presented at the Anomalous Absorption Conference, Banff, Canada 6/85. This modeling was well done and received a lot of attention at the meeting." The job assignment was written by Kindel but signed on July 30, 1986, because Kindel forgot to sign the evaluation on time. The important issue to note is that Kindel and Forslund are the lead theoreticians for the C02 effort at LANL and that they are wrong on this important scientific issue about C02.

On June 19, 1985 Mascheroni writes a memo with a broad distribution about " Issues Bearing on Antares Shutdown." The background for this memo was that Mueller

communicated his data in detail to Mascheroni, which agreed with Mascheroni's theory of 1983. Mueller and Mansfield had informed Mascheroni that management wanted to shut down Antares without completing the evaluation of C02 in the long pulse multiline (many amplifiers) regime. Mascheroni writes "This memo reflects a few areas of concern that may, perhaps, be taken into account in the process of shutting down Antares ... There is a Canadian group claiming that the hot electron production goes down-there are theoretical arguments to explain why the turbulence would be weaker [many of Mascheroni's reports] ..Mueller has obtained significantly lower Thot in the long pulse regime. Jack Kephard's method of time resolving ... shows a trend toward significantly lower Thot in the long pulse multiline weak turbulent regime. Indeed, I calculated a reactor target for C02 in this weak turbulent regime ... An opinion I would volunteer is that we will not be hurting the Aurora KrF effort by investing very little time and money to determine that we are not neglecting any alternative open for C02 ... for two weeks Mueller using Antares as it is now may check the results that he has obtained in the long pulse regime ... Mueller would then complete the experimental studies in approximately two or three weeks. After these experiments many of us will feel comfortable about shutting down Antares because if something was neglected by the "Los Alamos C02 evaluation" pertaining to the long pulse multiline regime, we will know... In conclusion.. I was told in 1982 [by management] that the long pulse multiline evaluation was going to be made in Antares rather than Helios..We did not use fudge parameters for these calculations-Our continued interest in Antares long pulse results is to rule out the possibility that the driving could be sufficient to allow for studies of fluid instabilities and

details of the burn (in spherical geometry). These issues are crucial to ICF, as well as any type of micro source at the lab ... a KrF Aurora shooter in spherical geometry will be here in perhaps about seven years. This is indeed a long interval with no experiments underway in spherical geometry." This is the first memo from Mascheroni that clearly indicates that he is for the completion of the evaluation of C02 in the long pulse and against the KrF Aurora target shooter program.

On September 4, 1985, Dr. Reed Jensen writes about the Antares Shut Down. "Effective this date, Antares will cease operation.. At the present time we have no plans to move Antares equipment." At this time Antares was fully refurbished. Mansfield, manager of the Antares facility, believes that Antares--with a few improvements--could reach a very high level of energy (similar to what the Livermore NOVA laser can reach today).

There are memos during January 1986 from Mueller (January 12, 1986) and Mansfield (January 9, 27, and 30) to upper management requesting a modest extension for the shutdown of Antares in order to complete the evaluation of C02 lasers in the new regime. In his memo of June 19, 1985 and presentations to management, Mascheroni revealed that there were several show stoppers for the Aurora target shooter program. Mueller and Mansfield were extremely critical of the Aurora target shooter system and indicated to management that it would never work satisfactorily. Mansfield writes: "My concerns are therefore twofold. In the first place, the Lab may have prematurely turned away from a major finding. In the second place .... with good coupling to the target, enough energy release may be achieved in fusion implosions to

provide a useful TNS in the event of a test ban."

On February 6, 1986, there is a memo from Mascheroni to Hirons, then Deputy to Associate Director Browne in charge of ICF, about searching for modest Antares funding for a few additional experiments.

On March 10, 1986, a review of Mascheroni's, Mueller's, and Mansfield's recommendations for additional experiments with Antares by the Los Alamos ICF management and staff scientists was called by P-Division Leader, Fred Morse. Mascheroni addressed theory, Mueller, the experiments, and Mansfield, the laser facility. An Associate Director (Rockwood) asked about KrF Aurora. Mascheroni indicated that the Aurora target shooter program had several show stoppers, the main one being the very low electrical efficiency, hence, lack of power, another the high cost for the KrF system. It was pointed out that a working Aurora was too far in the future, while Antares was a functional machine ready to fire fusion experiments not yet conducted. Mascheroni said that the Centurion Halite data indicated the need for much higher energies for ICF than what was currently accepted by Livermore, that these energies were about 100 MJ with a pulse length of about 50 nanoseconds. The abstract of the presentation called "relevance of Antares long pulse experiments" states: "My presentation centers on the theoretical framework comparison with the experimental data and consequences of much improved driving conditions in the long pulse multiline regime for C02 lasers..These issues are extremely relevant for high energy high efficiency chemical lasers (HF, DF, etc..) of interest to SDI and Fusion. No effort was made in comparing Aurora vs Antares for direct drive

implosion because timing discrepancy concerning when the experiments [with Aurora] would be made and unknown theoretical features including the influence of fluid instabilities [still a problem with direct drive KrF] on relevant targets..Mueller's presentation centers on the experiments, Mansfield presentation centers on the laser system"

On March 18, 1986, a memo from Mansfield, Mascheroni, and Mueller to LANL Management--including the Director--summarized the main points addressed in the presentation and explained that with minimal additional funding LANL could complete the evaluation of C02 in the new regime, while the KrF Aurora target shooter had show stoppers and could be delayed. They emphasized that the evaluation of a high efficiency laser technology was important because of the past investment, the future potential, and because with minimal additional investment, they could prove the chemical laser technology.

On March 21, 1986, there is a memo from Reed Jensen, then manager in charge of lasers for ICF at Los Alamos. Jensen was in the March 10 presentation. Jensen, proposes an "Integrated HF/KrF program Half MegaJoule Under Our Noses and 100 MegaJoule on Our Doorstep. In this memo, we suggest a merger of many aspects of KrF and HF/DF research programs."

On March 23, 1986, Mascheroni writes to Hirons about Antares shut down. "I think that we need to center the decision process on the technical points-the experimental plus the theoretical work could be an addition to the Los Alamos evaluation of C02, which is now incomplete ... one scenario is

that C02 could look much better than what I think. Theoretically the Thot went down a factor of 5, experimentally it went down a factor of 10 ... enhancing the coupling and making the situation look too good for C02 ... We do not want Antares to be in the news because these few months of life... I need to comment on the Goldstone factor. At the last Jowog meeting ... Goldstone spoke about evidence of decoupling in Antares. This is an error as both theory and data shows...."

On March 24, 1986 a memo from Associate Director Browne stated that Antares must be stopped. He agreed that Mascheroni, Mueller, and Mansfield had discovered a new regime, which was much more promising than before, but management had decided to put the funds into the KrF Aurora target shooter program and the Antares building was needed for CTR (Magnetic Fusion). He notes that the decision was "strongly influenced by recommendations from the NAS, commissioned to review the ICF program."

Browne quotes the NAS, which made a recommendation based on what LANL told them. The NAS panel members consistently recommended finishing the C02 evaluation. After LANL dropped C02, the NAS agreed to the decision, but LANL made the decision, not the NAS. The March 1986 NAS report does not approve the construction of the KrF Aurora target shooter facility. It does approve work on learning how to build a KrF laser, i.e., laser technology. A target shooter is much more difficult to make, it needs a target chamber, diagnostics, optics, etc. Browne states: "If a strong technical argument had been developed which quantitatively demonstrated the advantages of using Antares

in the long pulse ... over Aurora ... the Lab would have considered reallocating the necessary resources to do that job." However, the memo of March 18, to upper management as well as earlier memos and presentations, is explicit that Aurora cannot be a target shooter. It should be noted that the KrF Aurora target shooter program has been stopped at Los Alamos due to the show stoppers; the Magnetic Fusion (CTR) program has also been discontinued. The whole record is consistent with the reasons why Mascheroni, Mueller, and Mansfield were against the KrF Aurora target shooter program. Thus, after the fact, the reasons given by Browne for not completing the C02 Antares evaluation proved to be wrong.

In late March 1986, Antares was hurriedly destroyed. Dr. Mansfield reported that this destruction was not done in accordance with the guidelines for the disposal of government property, especially after being refurbished and at peak performance level. This refurbishment took place from June-September 1985. Mansfield, Mascheroni, and Mueller testified that Antares never made a fusion implosion experiment, the primary reason why it was built. The documentation of August 1983 shows that Antares was initially funded by DOE and Congress to reach breakeven, which implies fusion experiments. Antares was funded to complete the evaluation of C02. Looking at the yearly budget, the cost for the whole C02 ICF program was about $700M.

On April 1986, Kindel wrote Mascheroni's evaluation covering June 1985-March 31, 1986: "..Experimentally it appeared that the hot electron decreased by a factor 5 or 6 ... This behavior had been predicted by Leo in an early 1983

memorandum..Because this experimental result disagreed with all previous (single line) predictions and because of the significance of the results for C02 as an implosion driver, the analysis by the experimentalist Kephart and Mueller proceeded slowly and cautiously. Leo worked ..meticulously with these experimentalist ... on modeling and analyzing. In the course of this modeling effort Leo made careful comparisons ... he concluded at these conditions Antares could drive interesting implosions and allow for detailed studies.. and details of burn ... Leo's work at short-wavelength (KrF) exhibited a new feature in the modeling ... Lastly, in the course of these calculations Leo has done a first rate job in helping and supporting the LASNEX team ... Lasnex team leader John Norton, has said that Leo is one of the people in X-1 who most help his code .team... if I were to ever name a person in X-1 to help the Lasnex team, John's choice ... would be Leo ... In my view what he is doing is of considerable importance to the ICF program. His vision of having a IMF should be important to LANL ... He has literally, singlehanded and very effectively brought the issue of high efficiency infrared long pulse laser drivers to the attention of upper level management at LANL..."

May 15, 1986, a memo from Mascheroni to distribution discusses a sketch of an HF laser source of 100 MJ energy by the program manager for laser systems, Reed Jensen. This was the level of energy that Mascheroni had been promoting for ICF. Jensen was interested in HF, but due to problems with Cartwright, his boss, Jensen left to become a Deputy to an Associate Director.

In late May- early June 1986, Mascheroni contacted Dr.

Claude Phipps for the first time. Mascheroni showed him a sketch of a Hydrogen Fluoride laser at the 100 Mi level of energy that he wanted to use for his proposal. The meeting was in Mascheroni's office. Phipps was initially very skeptical. As he became more involved in Mascheroni's explanations, he understood that the ideas were doable. Phipps, a well-known U.S. laser designer and one of the leading scientists in the field, agreed to design the HF laser.

May 1986, Kindel, who initiated X-1's participation in the KrF Aurora target shooter program, resigns from the Laboratory.

May-June 1986, Mascheroni writes C02 reports as assigned by Kindel in the job appraisal-evaluation and gives them to Dr. Mueller. This was work in collaboration about the Antares results for Mueller to review.

In July 1986, Doug Wilson, who was working for the ICF Program Director, Cartwright, and a backer of the KrF Aurora target shooter program, is appointed the new X-1 Group Leader by Division Leader M. Henderson.

Early in July 1986, Mascheroni presents the Antares work at the "Anomalous Absorption Conference" at Lake George, NY.

In July 1986, Wilson deletes Mascheroni's assignment to work on HF (written by Kindel) and leaves for vacation. The memo from Wilson to Robertson on April 24, 1987 shows that Wilson started a log about his interactions with Mascheroni in July 1986. Other dates can be obtained from this log.

Special Report

In August 1986, Mascheroni writes a Draft proposal for building a Laboratory Microfusion Facility using a high efficiency chemical .laser, HF. [The secretary could not arrange to type it so he did it himself]. He took the proposal to Dr. Mike Henderson, X-Division Leader, and requested a Division review. There were few meetings between them during August-October 1986.Without reading the proposal, Henderson notes that the Draft may be classified, and that he needs some time to review it.

September 1986, Mascheroni and Phipps give seminars and presentations to scientists about the HF LMF proposal. They also present it to Dr. Paul White, Deputy, Center for National Security Studies. He thinks it is a good idea and suggests they see Associate Director Rockwood. Rockwood states that he would fund the proposal but he is leaving the Laboratory. He suggests the scientists see Associate Director Birely. Birely instructs Mascheroni and Phipps to give their memo broad distribution. After Birely, the HF LMF proposal is presented to Associate Director Pete Miller and many other scientists.

During August-September 1986, two Los Alamos National Lab reports are issued with Mascheroni, Mueller, et al, as authors. For the reports to be issued an LAUR number, they had to be approved by the X-1 group management (initials from C.Wingate), the X-Division management, and OS. The group secretary would have a copy of the report.

On September 24, 1986, Wilson signs Mascheroni's job assignment. Wilson's initial assignment given to Mascheroni on July 29 about VL&C is modified because it was scientifically unsound. Mascheroni complains about the

language used by Wilson in the job assignment; Wilson declines to change it. Wilson deleted the assignment from Kindel about working on HF and Wilson wrote instead:

"Leo is interested in exploring the potential of chemical lasers for a large laboratory facility capable of producing DT burn. We have no programmatic request to pursue this, nor do I support it. I believe that working on this will only serve to enhance Leo's reputation for doing irrelevant research."

During grievance hearings UC Prof. of Law, David Feller, asks Wilson why he wrote insulting language in a job assignment. The record shows that Wilson argued, but finally admitted that it was improper to have written such language. Mascheroni writes employee comments stating that the issue was about scientific competence, not personality. "Pertaining to my reputation. The comment made here must be supported by fact or is based on personal prejudice. This type of comment from Wilson is not new to me since he volunteered this opinion of me to others while he was in the program office [working for Cartwright]. If the guidelines for the pursuit of technical excellence set forth by the Director are to be adhered to, then this issue must be resolved. This is not the case where personal congeniality is the issue - the issue here is the very basic question of technical competence."

Mascheroni implies that the ICF LANL program is off track. The record shows that the NAS later recommended against the KrF Aurora program, which Wilson backed, and that the Canavan panel recommended HF for funding. Wilson later promoted HF to DOE as he acknowledged in the grievance response on December 8, 1987.

He implies that the ICF LANL program is off course. The record shows that the NAS later recommended against the KrF Aurora program.

In late September 1986, Henderson disagrees that an HF IMF could be of use to learn weapons physics and could be useful in the event of low threshold or comprehensive test ban. Henderson disagrees that ICF could be used for any military applications. Without any scientific review Henderson states that if Mascheroni pursues the Hydrogen Fluoride LMF proposal in his division, Mascheroni will be out of his division. Also (see for example the OPM investigation) he supported Wilson's insulting language in the job assignment. Henderson was later removed from management.

Mascheroni and Phipps give a seminar in the Chemical and Laser Sciences Division in October 1986. Wilson was at this seminar and the record shows that Wilson thought it was a good seminar.

On October 15, 1986, Mascheroni and Phipps presents to Associate Director W. Pete Miller, the HF LMF proposal for Institutional Supporting Research. Miller said that he will give funds if an associate director will permit it. Mascheroni and Phipps give a presentation to the newly appointed Associate Director, Browne, after Rockwood leaves the Lab in late October 1986.

At about that time (fall 1986) Program Director Cartwright tells Lindman that Mascheroni has been a problem since the Antares shutdown. Mascheroni is a loose canon, Mascheroni wants to sell HF and he (Cartwright) is against HF and for the

KrF Aurora program. Mascheroni is a candidate to be out. After the Aurora Program crashed Dr. Cartwright was removed from ICF management in the summer of 1991.

On about November 6,1986, Mascheroni presents an unclassified version of his proposal to the American Physical Society. Before doing so Mascheroni took his presentation to the LANL classifier, Phil Lang. Lang testified that he agreed the presentation was unclassified. After returning from the APS meeting, Wilson takes a copy of the presentation to Lang implying that it is classified. Lang explains that it is not.

On November 11, 1986, Mascheroni tells Barbara Thompson an X-1 group secretary, that his presentation at the APS (Baltimore) meeting contained fewer viewgraphs than the copy in the group office, thus, that the group office copy should be reviewed. The secretary did not want to correct the copy and Wilson report the incident to Robertson on April 24, 1987 as if Mascheroni had wanted to destroy the copy.

November 26, 1986, Mascheroni submits a presentation for HF for the "Topical Conference. . . " at Sandia in early December. After reading the abstract, Wilson directs Mascheroni to a specific poster session. The abstract indicates what the level of classification should be. Wilson is a derivative classifier. Mascheroni's abstracts go through X-1, X-DO, and finally to Operational Security (OS-6) at LANL. Sandia assigns the poster to the session that Wilson suggests.

On Dec. 9, 1986, Mascheroni presents his HF IMF proposal at the Sandia meeting. Dr. Sheldon Kahalas, DOE-Director of Inertial Fusion, is at the presentation. Kahalas suggests that

G. Canavan review the proposal. Wilson comes in during the presentation and tells Mascheroni to take viewgraphs out because of the classification level. Mascheroni complies. [In the OPM investigation, Wilson indicated that Kahalas took Mascheroni's clearance because of this incident where Mascheroni did nothing wrong.]

On Dec 9, 1986, Mascheroni and Phipps are told that Associate Director Browne has appointed a panel to review HF. The panel consists of 8 members and Greg Canavan, former Director of the Inertial Fusion Office at DOE, as Chairman. Canavan's record is relevant since Kahalas recommended that Canavan review the proposal. (When he was at DOE, Canavan was against HF and stopped a SNL proposal in the early 1970's because of the wavelength. Canavan was for the short wavelength glass laser program at Livermore. When he came to LANL he initiated the KrF laser technology program at Los Alamos. Canavan was not for the KrF Aurora target shooter program.)

On Friday December 12, 1986, Mascheroni needed help with viewgraphs for his talk to the panel on Dec 16. Della Ulibarri had left, thus he put these unmarked unclassified viewgraphs in an envelope inside Ulibarri's desk with a note requesting to be finished as soon as possible. Ulibarri told the group secretary Barbara Thompson on Dec 16, 1986 that Mascheroni left classified material in her desk. However, these viewgraphs were not classified, although Mascheroni's whole talk was classified. Wilson reported to Robertson on April 24, 1987, that the viewgraphs were classified although he never saw the viewgraphs.

On December 16, 1986, Wilson attends Mascheroni's presentation to the Canavan panel. He writes a page critical of Mascheroni and gives it to the panel. This page, without marking, is later submitted to security by Mascheroni and found by Lang to be classified.

From December 16, 1986 - February 17, 1987, the Canavan panel reviewed HF, reviewing Mascheroni and Phipps' work. There was a panel meeting with preliminary findings on December 18, 1986. Two committees, one for target physics and another for laser systems, were formed. There were about 15 meetings where technical issues were discussed. Mascheroni received many of the panel's questions from Canavan and Lindman.

In Feb. 1987, after the HF review, Canavan recommends funding for HF research. At the final NAS ICF review meeting, Prof. Rosenbluth asks Canavan why he changed his position on HF. Canavan responded that it was because of Mascheroni's theoretical work, the Antares data, the Centurion Halite data, and because the laser design was feasible.

In January 1987, Bill Mead, Deputy to Wilson, opens Mascheroni's safe and removes a classified report that is receipted to Mascheroni. Mead does not leave a note. Mascheroni is searching for the missing report when Mead appears to say that he has taken the report to give it to ICF Program Manager, Cartwright. Assistant Group Leader Gary Lee is informed of the incident. [Grievance testimony indicates that Mascheroni had complained that someone was opening his safe and rearranging his desk top.]

On about January 22, 1987, Wilson attends first DOE meeting about an LMF. Wilson calls Mascheroni from this meeting to tell him that he (Wilson) is promoting HF. Mascheroni answers that he would like to be the Principal in this project.

On January 26, 1987, Wilson, Mead, Wingate, and Gary Lee, the group managers composed the group narrative memo explaining why Mascheroni has to be RIFed. This memo states that it is because Mascheroni did not do the job assignments. This memo explaining the reason why Mascheroni is RIFed, called "the RIF narrative" explain that they RIF him because 1) on the criteria of "versatility and transferability Leo is inflexible ... He refuses to work on assigned tasks, He is unable to work on group projects..". 2) On the criteria of Programmatic Impact of Termination we see no adverse impact pf his termination. He has been assigned to work on documenting his C02 work and on working on laser lethality. Rather than work on these as agreed upon, he has chosen to pursue the HF IMF. Should the HF receive funding in the future we have better qualified people to do assign to the task." On 3) Job Performance and Achievement he is consistently a far-below average performer. He has consistently be ranked low in the performance ranking of group members used at salary review times...on occasion when some report was produced [by Mascheroni] the material was seriously flawed in both concept and detail. On (4) Skills Knowledge and Experience, he ranks low in the group. As mentioned before the work of his that has been evaluated in detail has shown gross conceptional and technical errors demonstrating and inadequate knowledge of ..our codes.". In his grievance document, July 20, 1987, Mascheroni attacked the memo and

requested deletion of each of the paragraphs. Wilson et al defended the memo in Mead and Wilson response of December 4, 1987 to Bivins of Human Resources. They defended their response at the hearings as the transcript shows. However the Hearing Officer Prof. Feller found out that this whole narrative is false, that Mascheroni did do the job assignments, that he knows the codes in detail, that he ranks very high in scientific skills, etc. It is also clear from his grievance documentation, because the reports are included showing that had the approval of the X-1 group office, that he did the job assignments and were reported to management because they have the LAUR number. This narrative memo states that if the HF proposal received funding that others in the group are more qualified than Mascheroni to do the work. I shall discuss Feller's determination later. In contract to this memo the Canavan panel that review Mascheroni's work later recommended Mascheroni's work for funding. In addition I know that Mascheroni did the work for the Academy using his brain and working in isolation at home with no access to critical material. The academy states that they review the chemical laser technology, at the same level than others national labs programs. Thus the academy ranks this man effort as equivalent to a lab effort. The Academy states that they review a lot of material. The Academy states that it is remarkable the amount of work at high level that they got for little funding, but because of Mascheroni's lack of institutional support, i.e. lack of access, they can not fund his HF program. Also Mascheroni got only 15 working days, to review in isolation his own work, while the lab got over a year. In addition Mascheroni produced work critical of the KrF LANL program for the NAS, thus of his group X-1, after the interim report. The LANL had more than a year of work to prepare

for the review, had about 100 people involved in the KrF program. The fact is that the initial interim report for the NAS was favorable to Aurora, but after Mascheroni's material sent to the Academy in February 28, 1990, about KrF, the NAS recommends stopping the Aurora target shooter program, which was under the leadership of X-1, Mead Wilson et al. It is remarkable that the X-1 group management could have written such a RIF narrative memo with so many derogatory statements including defamatory statements about Mascheroni's ability as a physicist in view of its outcome. There is no question that Prof. Feller was giving to Mascheroni nothing, when he ordered that the RIF narrative memo be deleted because it is false and defamatory. The real fact is that this X-1 group, named Inertial Fusion and Plasma Theory could not defend the Inertial Fusion Aurora program in front of the NAS, nor in front of Mascheroni.. A useful note is that Deputy Bill Mead and Associate Group Leader C. Wingate were taken out of management in 1988.

The Hearing Officer determined that this was false, that Mascheroni did do his job assignments. It is also clear from the documentation, because the reports are included, that he did the job assignments. This memo states that if the HF proposal received funding that others in the group are more qualified than Mascheroni to do the work. Mascheroni did the work for the Academy using his brain and working at home.

On January 27, 1987, the X Division Leader, Mike Henderson, wrote a paragraph to Associate Director Browne summarizing the RIF narrative memo and gave it to Associate Director Browne: "Leo is inflexible and has little probability of successfully performing work not of his choosing; he

refuses to work on assigned tasks. He is unable to collaborate in group projects. There is no adverse impact on our programs by his termination." The UC Hearing Officer ordered this memo to be deleted because it was false. The testimony and documentation proves that he did his assigned tasks. Further that he generated strong support from other scientists and non scientists producing a very strong team. There is evidence everywhere including the media showing that Mascheroni was a strong influence in stopping the KrF Aurora target shooter program. This is directly the impact that Mascheroni's RIF had on X-1, X-Division, the ICF at LANL, and on Defense Program in general. The lab wasted the funds spent in the Aurora target shooter program and those funds used in the C02 program which finished without evaluation. The IMF was a strong idea considered by the NAS, and Mascheroni was the pioneer at LANL in this area as recognized by Kindel. Mike Henderson was removed from management in about 1988-1989.

It is useful to recall that the 1990 National Academy of Sciences Review Panel basically states that they reviewed the chemical laser technology, at the same level as the other national lab programs. They state that they reviewed a lot of material. The Academy states that the amount of work they got at a high level for little funding (in fact, none) is remarkable, but that Mascheroni did not have institutional support, thus they cannot fund the HF program.

LANL had more than a year to prepare for the review, and had about 100 people involved in the KrF program. The initial interim report for the NAS was favorable to Aurora. After Mascheroni's material about KrF, the NAS recommended

stopping the Aurora program. This group (X-1), named Inertial Fusion and Plasma Theory, could not defend the Inertial Fusion Aurora program before the NAS.

Drs. Bill Mead and C. Wingate were taken out of management.

Feb. 3, 1987, Wilson pursued an infraction against Mascheroni with OS for an incident which occurred on Dec 9, 1986, at the SNL Conference. OS states that it is inappropriate to issue an infraction.

January 27, 1987, the X-Division Leader, Mike Henderson, wrote a paragraph summarizing the RIF narrative memo and gave it to Associate Director Browne. The UC Hearing Officer ordered this memo deleted from the file because it was false. At the time the Canavan review was nearly over and the recommendation was about to be written, Dr. William Mead, a member of Canavan panel and Deputy to Wilson helps to write the RIF narrative memo in clear contradiction with the Canavan panel's recommendation. The RIF narrative about Mascheroni's work reached Browne about three weeks before the Canavan panel's recommendation.

Feb. 2, 1987, Wilson wrote a memo to Security Division Leader Robertson pursuing an infraction against Mascheroni with OS for the incident which occurred on Dec 9, 1986, at the SNL Conference. It should be noted that Wilson suggested to Mascheroni to present HF at this meeting, knew that Mascheroni's presentation were at a certain level not permitted in this section, read Mascheroni's abstract where the level is clear. Lang testified that Mascheroni was the least

culpable in such an incident, however, Wilson basically stated to DOE IF Director Kahalas that was Mascheroni's fault. Later he tried to get Mascheroni an infraction from LANL Security for this.

Feb. 4, 1987, Wilson reports a meeting with him and Henderson where they communicated to Mascheroni that he was RIFed. Wilson reports "Leo was very quiet. He did ask whether John Browne knew about this and Mike responded he did." Mascheroni also asked Henderson, what about the HF review that is coming positive? Henderson said "What review?"

On February 9, 1987, OS/Robertson states that it is inappropriate to issue an infraction as suggested by Wilson in his memo of Feb 2, 1987. In his response of December 8, 1987 and testimony, Wilson states he did this in case Kahalas wanted to follow it.

On February 12, 1987 Phipps writes to Browne about "Future of the HF LMF project". "This note concerns the immediate future of the HF IMF source project, and my request to you for support of the next phase of this study, in order to achieve maximum benefits for the Laboratory ... I believe that Leo Mascheroni's enthusiasm, dedication, and technical knowledge ... have been crucial to the evolution of this concept to its present state in a very short time. I also believe that his unique technical and intuitive attributes will continue to be essential. The two of us have complementary personalities and work very well together..."

On February 17, 1987 the Canavan panel issued the "technical

review of HF-driven laser fusion" memo. "Attached is the report on the technical review of HF laser fusion you requested .... The important point seems to be that the principal motivations for the proposal remained intact through the review: the high electrical efficiency of the F laser could make its cost an order of magnitude less than that of short wavelength lasers, it might drive target efficiently at that scale, and it could be simpler to build." The panel had 9 members which included Mead and Wingate from X-1, who were for the KrF Aurora target shooter program and against the HF proposal from the beginning. Golsdstone from P-4 was for the KrF Aurora program and against HF. In fact the panel was composed mostly of Aurora supporters. There were nine members: Canavan, Feiock, Goldstone, Lindman, Mead, Saxman, Spillman, Hughes and Wingate. After Mascheroni's work, they write:

"Summary and Recommendations". The group discovered no obvious show stoppers in either target or laser physics ... The attraction of the concept remains that it could, if successfully and effectively developed and engineered, produce laser energies in the 100 MJ range for a cost of 10-20 times less than for short wavelength lasers [glass and KrF] which bring the energies that-may be required for fusion experiments within the reach of the country, let alone the laboratory..

Conclusion. Overall the next step of detailed evaluation seems technically worthwhile. The issues are discussed above. the resources would be 6 scientists for the rest of the year..It is appropriate to observe that Hf is far behind glass or KrF lasers for fusion but that need not be disqualifying. there is little to the laser physics that could not be tested with a 10 kJ

module, which would only be 10% the size and cost of Aurora..If they worked a HF laser could be built faster than other of the competitors and cheaper.. Associate Director Browne had ordered a review of the HF program and at the time the Canavan review was almost over and the recommendation was about to be written. Dr. William Mead, who was the Principal Theoretician for the KrF Aurora program was a member of Canavan panel and also the Deputy to Wilson. Wilson and Mead had written quite a lot during the grievance process to justify their RIF narrative with defamatory statements about Mascheroni. The RIF narrative memo are in clear contradiction with Canavan panel recommendation. The RIF narrative about Mascheroni's work "reached Browne about three weeks before Canavan's panel recommendation for Mascheroni research work did."

Mascheroni had stated to the panel at meeting the show stoppers for Aurora and made calculations showing that the coupling is not an issue for the high efficiency chemical laser HF. This panel report indeed is for HF and against KrF Aurora target shooter even though the panel would never write it explicitly. It states that HF could cost 10 to 20 times less than KrF or Glass, or competitors.

On February 18, 1987, there was a meeting between Mascheroni and Associate Director Browne. At this time Mascheroni did not have the RIF narrative memo nor did he know that such a thing existed. Mascheroni had a talk "Laboratory Microfusion Facility Project," composed of 9 viewgraphs. In addition, he gave to Brown and his assistant Giovanielli his February 17, 1987 memo. The analysis is rather complete. It notes the problems in LANL ICF

management, notes that HF won the review, notes that KrF Aurora target shooter program has show stoppers, notes the cost advantages for HF vs glass at Livermore, notes the Centurion Halite and Antares data, that DOE/Kahalas is not sure if they are against HF, they said they like the ideas. Mascheroni makes the point that a decision for KrF Aurora target shooter and no funds for his proposal is a no win situation for no one. Mascheroni addressed management: "Could they be discriminating toward a staff member of a different cultural and ethnic group and attacking his scientific credibility .." Why Wilson attempted to have a Security Infraction applied to me over a highly questionable issue? What are our accomplishments in ICF? Are they from LANL or from LLNL?... Is it because I found a good experimental use for ANTARES and my persistence for having it evaluated-that I have been asked to leave the lab?... Is there any existing environment in which Mascheroni could continue these studies? Within the Lab? Where? ..When a Comprehensive Test Ban becomes inevitable, what do we ask from Washington? Why does a technical person have to become a political person to have new and well defined ideas heard? In the memo Mascheroni writes: "I am a strong and broad scientist who pursued an idea on its technical merits for my benefit and the Laboratory's". There is a tremendous amount of courage due to the risk one takes in such an endeavor. It is also clear that my RIF has no technical base and is against the general policy stated by Hecker; but is a consequence of two contradictory political opinions. Anything that is not [low efficiency] short wavelength is not welcome at Los Alamos, and anything new that has to do with weapons physics at the lab, e.g., the LMF for weapons research is not welcome at LANL. The argument for building an LMF is that

when a CTB becomes inevitable it follows that this is one of the things that we must ask Washington to do.."

February 19, 1987 there is a Canavan panel meeting in Browne's office. Canavan stated to Mascheroni that he argued for his recommendation to Browne.

On February 22, Browne said that he would review Mascheroni's case. He said that he could not reverse the RIF because Mascheroni had management against him. Mascheroni presented to Browne his memo of February 22, 1987. "This memo takes a look at a possible solution that might be considered."

On February 23, 1987, there is a memo from Wilson to Henderson explaining and defending his insulting language about "irrelevant research" in the 1986 job appraisal.

On February 23, 1987, there is a memo from Mead to distribution backing the KrF Aurora target shooter and expansion in KrF, and against any funding for HF. His statements are in sharp disagreement with the Canavan panel's recommendation.

On February 27, 1987, there is a memo from N-Division Leader Hirons to Browne: "Mascheroni firmly believes that he is one of the strongest theoretical physicists at the lab and that his talents could be utilized in a number of different areas. He feels he has worked extremely hard to develop scientific ideas that have technical basis ... I really believe that Leo is an extremely bright and innovative physicist who could make significant contributions to the Laboratory's mission .."

Special Report

On about March 3, 1987, Frances Menlove the Lab psychologist, called Mascheroni to ask why he was not participating in the program for RIFed staff members. She informed him that there was a RIF Narrative memo and that he had the right to see this memo.

On March 3, 1987 Mascheroni requested his X-1 file and RIF memos from Gary Lee. Wilson gave it to Mascheroni, as stated in the Wilson to Robertson April 24, 1987, memo.

On March 4, 1987 Mascheroni, after seeing the RIF narrative went to see Browne with his written reports about C02, and the RIF memo. He stated that the narrative is false, that he wrote the reports as assigned, etc. Browne stated that he did not know who was saying the truth but he could not reverse the RIF because Mascheroni had management against him.

On March 5, 1987, a memo from John Norton (X-7), the LASNEX team leader to Browne states: "..I found Leo quite pleasant to work with but also quite demanding. In my opinion he knows a great deal about the LASNEX code and has rarely brought up difficulties with the code that were not true problems. Leo is extremely hard working and self-motivated. He often works nights and weekends when he is trying to complete a set of calculations .... In summary, Leo is very hard working, quite knowledgeable about laser deposition, plasma physics, and a broad range of basic physics areas, and is very creative. He knows how to use the LASNEX code as a more basic science tool, which is the way he prefers to work and I have enjoyed working with him ... I believe that Leo has important contributions to make, if he can find the right niche for himself."

On March 6, 1987 Mead gave to Mascheroni his termination notice. In Wilson's April 24 memo he reports: "Mead said it was uneventful."

On March 10, 1987, Mascheroni responds to Mead's memo of February 23, 1987, at the request of Phipps. Mascheroni addresses 12 points in detail. This memo gave the reasons why an LMF is important, why the Aurora KrF is of no value, why HF is important. In this memo Mascheroni suggests a National Academy of Sciences review to resolve the KrF Aurora vs HF issues. This memo was classified by Wilson on March 11. The issue is reported in Wilson's April 24 memo. Mascheroni then went to Lang and made a few changes to declassify it.

In a memo dated March 9, 1987, Browne writes about "technical review of HF driven laser fusion," to the panel, Mascheroni, Phipps and management. "Your report which is extremely well written, defines the relevant issues for HF and identifies a possible course of action. I assure you that we will consider the finding of your report along with current ICF program priorities to determine the most appropriate course for the Laboratory.." Thus Browne is saying he will make the decision some day in the future, depending on funding, but not that he will not fund HF, which has a recommendation for funding from his own appointed panel.

On about March 11, 1987, Mascheroni briefed Director Hecker, Deputy Director Birely, and Associate Director Browne about the reasons why HF was a strong candidate for ICF and that the KrF Aurora had show stoppers. Mascheroni requested a reconsideration of his RIF, and that some funding

be given to the HF technology due to the applications. Hecker said that he understood the issues better but that Browne was going to make the decision.

On March 17, 1987, a memo from Kindel to Browne states: "Leo has good scientific credentials..His commitments are deep and not easily made. In this sense he is different from most people. But when Leo says he will do a job he does it ... My impression has been that his loyalty to LANL has been deep and grounded in a duty to do his very best.... In my opinion he has good technical skills."

On March 20, 1987 Phipps informed Mascheroni that Livermore may be interested in hearing the proposal. Mascheroni requested the transfer of the clearance to Livermore for March 27, 1987.

On March 27, 1987 Mascheroni and Phipps gave a well received talk at Livermore.

During April 1987, Drs. Wilson and Mead attended a DOE meeting about the LMF. They told Dr. Roger Bangerter, Livermore X-Division leader (to whom Mascheroni was applying for a job), the false information used in their RIF memo to justify Mascheroni's RIF. Testimony by Gary Lee at the grievance hearing supports the fact that this was against the guidelines given to management with respect to RIFees, management was not supposed to discuss who had been RIFfed.

Associate Director Browne is later (1990) relieved of the responsibility of managing the ICF and Weapons Programs.

Associate Director Birely takes on the responsibility of managing the Defense Programs, including ICF.

On April 2, 1987 Mascheroni submits a request to Associate Director J. Browne that he be permitted to use the X-1 office (in a cleared area) for 90 days, and the use of his X-1 (IBM) computer at home for 90 days before moving to his new N-9 office outside the fence. Browne's secretary, Jeane Andrews, states to Mascheroni that Browne's office typed a memo to Henderson making this request. The Hearing record shows that Wilson, Mead, and Henderson opposed the request. Browne was supposed to make a decision.

On April 17, 1987 Wilson called Henderson and asked about Mascheroni's continued use of his desk. According to Wilson's log, Henderson suggested that Wilson call Security to take care of the problem.

On April 20, 1987, Wilson calls Physical Security (OS-2) to come to TA-35. G. Weber and D. Wilson make several accusations of security infractions against Mascheroni and put false information into the LANL security system about him.

It is useful to recall that a Lab report from LANL's Human Resources, Ms. Bivins, through Foley to Browne, June 1988, shows that Wilson agreed that he put false information into the security system. This information can be construed to be severely damaging to a scientist, particularly one of Argentine origin. Wilson stated to security officer Weber that Mascheroni went to Argentina without permission from LANL and/or DOE in January 1984. Wilson also stated that Mascheroni had classified information in his desk and that he

had been typing classified with his computer at home, along with other accusations that make Mascheroni appear to be a security risk. Wilson's and Weber's "In Confidence" memos are in the documentation. We shall not address the issues covered in the testimony to the Inspector General dated August 30, 1991.

In the spring of 1988 an OPM investigation was conducted on Mascheroni. This investigation noted that Lang discovered that there was no classified in Mascheroni's computer at home after reading the hard disk. This is exhibit #5 of the OPM report. Gary Weber, the security official who listed the materials found in Mascheroni's desk, listed unclassified viewgraphs as classified. Weber is not a derivative classifier and he did not take the material to a derivative classifier.

On April 21, 1987, by his report memo, Weber indicates that Mascheroni is a security risk. Mascheroni explained to Weber about the conflict and that Wilson was out to get him. After Mascheroni left, Weber obtained new derogatory information that was false from Wilson and put it into the security system. This is clear from the memos and OPM documentation. OS Division sent Wilson and England to brief Michael Peck, security chief at DOE, the next day.

On April 21, 1987, the information of security infractions came to DOE without following the standard guidelines at Los Alamos National Lab. At LANL the group leader customarily took care of the infractions himself without going to LANL security. For DOE-LAAO this was extremely unusual and was a clear flag against Mascheroni.

April 27, 1987, a report from LANL to DOE states that there were security infractions. However the OPM report, particularly exhibit #5, and Lang's testimony shows there is no classified material on the disk. LANL's report from Weber lists material that was supposedly classified but, in fact, was not. Weber's testimony to Feller indicates that Weber is not a derivative classifier. Mascheroni stated to Weber that the viewgraphs were not classified but were part of a classified presentation. He said there was a conflict between KrF and HF, group management and himself. Weber decided that Mascheroni was hysterical, even though the facts show that there was, indeed, a conflict. The Lab later lost the Aurora program on the basis of the same shortcomings that Mascheroni had told the Lab's ICF management.

April 27, 1987 Mascheroni gives his seminar at CLS-DO about the HF LMF, using the viewgraphs he prepared the weekend of 4/19/87.

April 27, 1987 is the date when Mascheroni starts the Lab Grievance process by filing his intent to grieve form with Mr. Paul Farrell in HRD-1.

May 11, 1987, a memo from Mascheroni to OS Division Leader Charles Robertson states that there is a conflict (HF vs KrF) and that the KrF management was after him. He requests an investigation to clear his name from wrongdoing and requests a meeting with Robertson. Mascheroni was never questioned by LANL about the alleged infractions; no one at LANL ever discussed the alleged charges with him. LANL security guidelines of October 1987 state that the employee should understand why a supervisor is charging him

with infractions. In Mascheroni's case, everything was done "In Confidence" behind his back.

Also the OPM investigation reveals that in May 1987, there was a meeting between LANL OS Division Leader Robertson and DOE Security Chief M. Peck about Mascheroni. I was at DOE LAAO when this meeting took place. The meeting was against guidelines pertaining to security infractions, and how they are transmitted to DOE. Afterwards, a memo from Robertson to Peck (dated May 14, 1987) states that the Lab has put "flags" on this case. It is clear that with such derogatory information from the Lab, the access would be suspended. With a suspended access any RIF will mean Mascheroni's termination.

The OPM investigation indicates that Peck requested the FBI to investigate the issues. The OPM also reveals that the FBI did nothing because the LANL report did not show irregularities. For infractions the standard rule is that the OPM investigate them, not the FBI. Thus Peck did not need to call the FBI. He did it because of the derogatory information from LANL, most of it verbal, as the OPM investigation shows.

May 27, 1987, a meeting of the Internal Security Executive Committee (ISEC) is called to discuss Mascheroni and if Mascheroni could be a security risk. Participants include: X-Division Leader Henderson, OS-Division Leader Robertson, Associate Director Tiedman, Associate Director Browne, N-Division Leader Hirons and the CIA representative. The OPM investigation reveals that Henderson and Robertson wanted to take Mascheroni's clearance and

consider him a security risk. Henderson stated that he wanted Mascheroni out of the Lab. Hirons defended Mascheroni stating that Mascheroni was now working in the open and that no classified work was permitted. This meeting is described in the OPM investigations by Henderson, Robertson, Hirons, and Browne.

On about May 30, 1987, Hirons took a memo to Mascheroni about the infractions charged against him. Mascheroni did not accept the infractions. Hirons advised Mascheroni to put the issue in the grievance that he had started. The infractions were presented to Mascheroni's supervisor in N-9. The supervisor requested an explanation for the infractions. Mascheroni's relationship with his new supervisor deteriorated quickly.

The OPM investigation and documentation shows that Browne, Henderson, Wilson, and Mead stated that the Canavan review was not positive and did not recommend funding. This contradicts the statement by the panel in its report, and what was published in the media quoting Canavan. It also contradicts what Canavan, himself, testified before the NAS review panel.

The OPM investigation reveals that the CIA made an assessment of damage about Mascheroni's case, and in May 1987 the Lab considered the issue finished.

On about July 1, 1987, Mascheroni met with Lab Deputy Director Birely. Mascheroni noted to Birely that he had predicted the outcome of a Halite shot. Birely informed Mascheroni that on July 10, 1987 the results would be

discussed at the Weapons working Group (WWG) meeting in the Administration Building.

On July 10, 1987, Mascheroni attended the WWG meeting. During presentation Mascheroni commented that it was clear (before the experiment) that the LANL experiment was not going to be successful.

On July 12, 1987, Hirons informs Mascheroni that Raymond Hunter, Assistant X-Division Leader, called complaining about Mascheroni's presence at the WWG meeting. Hirons explained that it was open to anyone with a 'IQ" clearance. Hirons' assistant had attended the meeting and reported to Hirons what had happened.

In July 1987, Wilson communicates to N-9 Group and Section Leaders about the security issues against Mascheroni via an employee appraisal. This documentation indicates that there was a security investigation on Mascheroni. At the time no security investigation had been made by the Lab or DOE, as the OPM investigation shows. Also Robertson stated this to Mascheroni. (Prof. Feller ordered this job assessment by Wilson to be stricken from the record because he found it to be false.) Mascheroni's supervisor in N-9 became more concerned.

July 20, 1987, Mascheroni completes filing his grievance documentation with LANL's Human Resources Group (HRD-1).

July 20, 1987, Mascheroni has separate meetings with Browne and Birely to tell them that he has filed a grievance.

He requests some determination on the funding for the HF proposal because DOE is actively pursuing an IMF. Mascheroni notes that HF is a stronger technology for military and civilian applications than glass or KrF. Mascheroni understands that DOE may be interested in funding HF. His memo to Browne with distribution to Birely and Hopkins states: "..a) As you know the data on (Centurion) ICF capsules does not scale with the laser energy proposed and hence it will be impossible to convince the NAS about the LMF. b) LANL X-1 has not had any success because none of our ICF capsules performed (WWG meeting presentation on July 10, 1987 by Wingate) I had predicted this uninteresting behavior in conversations, seminars, and memos..my last one was my April 27, 1987 colloquium at CLS...." The OIF which knows of my proposal has told me that I need to produce a low level of effort at LANL for them to be able to produce something...I am told that LANL is pushing for a 100 kJ KrF which is a very vulnerable idea. What can we learn from a 100 kJ KrF that Livermore would not have learned with NOVA?...I noted that there is weapons funding subsidizing ICF and SDI, however there is no success for us as I mentioned above. If part of this funding had been spent on my work on HF, it would have been a preferable decision because we would by now have something to show ... I need a location where I am able to do classified work..I would like to participate in the steering committee representing HF..."

August 26, 1987, Hirons approves transfer of Mascheroni's clearance to DOE Washington. Mascheroni meets with DOE-DIF Official Kahalas and with Prof. William Happer of the National Academy of Sciences. Dr. Kahalas is informed

for the first time about the HF proposal and the Canavan review. Kahalas indicates surprise and tells Mascheroni that he is going to set up a panel and review the HF issues. "He [Kahalas] stated that 'there was the consensus of Fusion management that there was not yet a fusion driver.' He said that I was coming with a positive review and a strong theoretical position proposing HF as the driver for ICF. He asked why is Los Alamos not pursuing this?" [Quoted from a letter from Mascheroni to Hirons, below].

The same presentation was given to Prof. Happer, chairman of the 1985-1986 NAS review of the ICF program.

August 1987, Michael Peck requests assessment of Mascheroni's access, as OPM investigation shows.

On September 15, 1987, Mascheroni informs LANL management, i.e., Browne, Birely, and Hirons of the interest he aroused in DOE-ICF Washington.

Early September 1987, Mascheroni speaks with Kahalas. Kahalas proposes a panel to review HF question when he comes to LANL in October. He indicates to Mascheroni that he has asked Cartwright to include Drs. Canavan, Forslund, Mead and McCall on panel to discuss the HF proposal. Kahalas comes to LANL October 11-12, 1987.

On September 17, 1987 Mascheroni's access is suspended by letter from Roeder, Assistant Manager for Security and Emergency Operations. "This letter advises you that the Manager, AOO had directed the immediate suspension of your DOE access authorization pursuant to Section 710.21 of

10 CFR Part 710, "Criteria and Procedures for Determining Eligibility-pending resolution of questions which raise substantial doubt concerning your eligibility for continued DOE access authorization.." Thus as the OPM investigation reveals in statements from Lucy Martinez, the access was suspended without questioning. The process at the time was that if derogatory information is found, for the type of charges against Mascheroni revealed at the questioning, the employee is questioned by his supervisor. Later, if the questioning has not resolved the issues, there is suspension as described in 10 CFR 710.

The questioning done by DOE's Lucy Martinez took care of this case after the suspension. Mascheroni had classified material with him for a presentation to Physics Division Leader, Damon Giovanielli. I took the material back to the LANL Archives. It was clear that Mascheroni was actively working on HF and promoting a proposal that was recommended for funding by a LANL panel when his access was suspended. DOE did not give him the 10 CFR, nor explain the process of access reinstatement.

On about September 19, 1987 the N-9 Group Leader and Section leader had a meeting with Mascheroni. They told him that he was "pissing against the wind," that his situation in the group was now very bad because of his clearance suspension.

On September 24, 1987 Mascheroni writes to Manager Romatowski, with copies to LANL, Browne, and Robertson. Mascheroni explains that the ICF management and Wilson, in particular, are after him because of the ICF technical conflict (KrF Aurora target shooter vs HF) and Wilson's interest in

making him culpable for infractions: " ... If the scheme I propose, (for ICF and SĐI) and which has been reviewed, is the way of doing this to stop my work or to severely slow it down has the potential to jeopardize the future security of the U.S." In fact, Mascheroni reacted immediately with a sequence of memos to LANL and DOE requesting the reasons why DOE suspended his clearance and clarification. Browne said he would ask Deputy Director Jackson. Browne later said that there was a hearing process to be pursued with DOE.

On September 27, 1987 Mascheroni wrote to Hirons, with a copy to Robertson: "On September 25, Robertson told me that on May 14 he forwarded documentation to M. Peck, LAAO, and a memo indicating that my case is closed. On June 2, he forwarded the documentation to Romatowski. There is no report from the meeting of May 27 in Tiedman's office in which it was concluded that I am not a security risk. This information is vital for my case ... Peck DOE indicated that I need someone at the Lab to state to Romatowski...." Mascheroni summarizes the DOE questioning in this letter and that the information is false.

On September 29, 1987 Mascheroni wrote to Robertson." Thank you very much for your telephone communication and your suggestion last Friday..I shall very much appreciate your contacting Tom Hirons to write some sort of summary of the discussion pertaining to me during the May 27 meeting in Tiedman's office. Enclosed, please find a copy of my grievance document which has become part of my September 17 deposition to DOE ... Phil Lang has a copy of the document originated by Wilson on about Dec 16, 1987.." The

OPM documentation reveals that Robertson gave false information to DOE-LAAO and was against Mascheroni at the ISEC meeting. DOE and Lang classified Wilson's document. Later Robertson went to DOE HQS and briefed Mike Seaton about Mascheroni's case.

In October, Mascheroni had telephone communications with DOE about the access suspension. A DOE officer, Mr. Jay Stewart, executive assistant to Gilbert, Assistant Secretary for Security Affairs, suggested that Mascheroni contact Congress, which he did.

In about late September-October, Pat Tyler, secretary to Browne, stated to Mascheroni in a phone conversation that Browne will not help him.

October 13-15,1987, Kahalas comes to LANL. The panel he is supposed to meet with, to include Canavan and McCall, has been changed by Cartwright to include neither of the two. The panel is composed of only KrF advocates. Kahalas later explains in a letter to Congress, through Troy Wade, that he has agreed with Los Alamos to put all the ICF funds into the KrF Aurora target shooter program.

In October 1987, Mascheroni's grievance is given to Ms. Bivins, newly appointed to HRD-1 at LANL. Ms. Bivins suggests sending the grievance to a classifier. Lang suggests a few corrections, Mascheroni corrects or clarifies, and Bivins accepts the documentation. The security issue is clearly covered in the document, and is part of the grievance.

During November, Bivins send the grievance to Wilson,

Mead, Henderson, and Cartwright for their response. In the distribution it is clear that the Lab had involved its legal branch (C. Gray). Because the grievance claims discrimination the Lab should have informed Mascheroni that he should also file a complaint with EEOC or Human Rights, especially if the security issues were to be blocked from being considered as part of the grievance.

On November 14, 1987 Mascheroni wrote to Romatowski with copy to Mr. E. Wagner, OS-DOE Washington. "A RIF at Los Alamos is very likely... I have requested to Browne [to make a decision about HF and) that I be paid from a Lab account ... My ICF work was reviewed by a technical panel and was determined to be relevant and worthy of further research ... Mr. Wagner suggested that in order for me to retain my employment during the suspension period, hence, to guarantee that a hearing is conducted further communication between you and Dr. Hecker may be necessary."

On Nov. 15, 1987 Mascheroni writes to Associate Directors Birely, Browne, Hopkins, and Miller about "Funding potential for an LMF and an integrated HF/KrF program." The memo summarizes the motivation for an IMF, that glass and KrF are too expensive, and that the KrF Aurora program has show stoppers. Thus, that research in HF at LANL should be pursued, due to the Canavan panel's recommendation, and that a decision should be made on the issue of HF funding. At the time LANL is pursuing HF for SDI through defense programs' discretionary funding, i. e., the Meteor laser.

On Nov. 22, 1987, Mascheroni writes to Dr. David Gardner, UC President. This is a formal grievance letter with copies to

the LANL Director and upper management, DOE-Kahalas, NAS--Profs. Rosenbluth and Happer, OMB, and, DOE-Gilbert. "I welcome a complete study now, at any time, and from time to time to determine whether I am a security risk. The charge that I am a security risk is complete nonsense... It is a complete travesty of science to cut off scientific discussion of the relative merits of HF compared to KrF by revoking the security clearance of the physicist who proposed the HF laser so he cannot take part in the debate .... What is clear... is that ... RIFing me and producing the suspension of my security clearance in order to exclude me from the discussion is not the way to resolve a scientific dispute. Nor is it a sound way to conduct the public business and determine public policy--by firing me out of Los Alamos so that I cannot bear witness to which of the Los Alamos lasers may be successful and to the scientific shortcomings of the sponsors of the KrF [Aurora target shooter] as a driver ... I would welcome a review by the National Academy of Sciences ... "

On January 22, 1988, Hirons writes to Director Hecker and Associate Director Browne requesting that the Lab make a decision about HF funding because Mascheroni is going to be RIFed and his group, N-9, will be dissolved. Hirons states that he does not understand why DOE is taking so long to resolve Mascheroni's security problem. "I feel it is up to the Lab as a whole to decide whether Leo should be kept on the payroll until some of these issues are resolved ... Leo's chief concern now is that if he is terminated from the Lab, DOE will drop the resolution of his suspended clearance, and he will pretty much be excluded from getting a position anywhere in the ICF community. I understand this concern

and I do not understand why DOE is dragging their feet so long in resolving his clearance issue."

On February 5, 1988, Deputy Director Jackson answers Mascheroni's request for funding by denying funding. "I believe the Lab is deliberate and careful in its programmatic and personnel related decisions and has adequate safeguards .." [The KrF Aurora program was stopped after the NAS recommendation due to the same show stoppers explained to management by Mascheroni since 1985.]

During February-March the Office of Personnel Management starts an investigative report and questioning of witnesses about Mascheroni's access. Mr. Robert Martin is the investigator.

On February 18, 1988 and February 22, 1988, Mascheroni writes memo to LANL HRD-1: "I have discussed with the University of California and Congressional staffers the possibility of making the press aware of my situation. It is clear that it is my privilege and within my right to do so... I am not in a financial situation to be unemployed .... I need to be back in ICF and to have access at least to my own work... If Browne could give me support until the grievance and the security issues are resolved, then I would be willing to forego serving him with the grievance ... Due to the time element I need to know his answer within one week ... This is explained in more detail below ... The primary reason that I have changed my position with respect to Browne and have requested that he be served with my grievance has to do with the February 5,1988 memo from Jackson..." LANL did not permit Mascheroni to add Browne to the grievance, and

Mascheroni took the issue to the press.

In February 1988, Mascheroni writes to Congress about the situation with his clearance and in ICF.

On February 10, 1988, UC Vice president Frazer writes to Mascheroni with copies to Hecker and Gardner. He declines to involve the University in the controversy: "I understand that you are currently following a grievance procedure ... It would be improper for me to intervene in the proceedings."

March 21, 1988, the New York Times prints an article about the ICF program and mentions Mascheroni. Mascheroni requests the NAS review of the ICF program and a Congressional investigation, in this article.

Director Hecker testifies to Congress opposing an NAS review of ICF for 1989. Livermore testifies to Congress in favor of an ICF review by the NAS.

On March 22, 1988, Senator Domenici's office communicates to Mascheroni that Human Resources Foley answered Domenici's inquiry saying that "His selection for the RIF was based on the fact that he would not work on assignments given to him by his management ... In the meantime Mascheroni's security clearance was suspended by DOE because of security infractions ... He is protesting this suspension.." The fact is that Prof. Feller found that Mascheroni did do the job assignments, that the RIF narrative memo was false, that the NAS recommended against the KrF Aurora program and that DOE took his clearance because of false derogatory information introduced by LANL

management.

In late March Romatowski answered Mascheroni's letter of January 18, 1988. "Credible and legitimate security issues of significant concern has been raised about your eligibility for access authorization, and it is not in the best interest of national security to ignore those concerns.." However, LANL had introduced false information into the security system, and DOE did not follow the guidelines for access suspension.

On March 29, 1988 DOE ALOO Personnel Security writes to Mascheroni: "The LANL has requested that your access be terminated due to the reduction in force effective on March 16, 1988. Accordingly, further processing of your case has been terminated without a final determination.."

March 1988, DOE Assistant Secretary Troy Wade answers Senator Bingaman's letter of inquiry about Mascheroni's case. The security part of DOE states that Mascheroni lost his clearance because of serious derogatory information. DOE Kahalas wrote the program part of the letter. He states that after the October 1987 meeting that he agreed with LANL management that the ICF funding should go to KrF Aurora. Thus, that although there are merits in HF, there is no funding for HF. While there are attractive points to Mascheroni's HF proposal it is far from technologically assured and would take a major development program to evaluate the HF concept. [After the work in Japan, by Obara et al, published in late 1988, this is not true.] Inertial fusion program activities at LANL include the KrF Aurora program ... Based on review and discussion at LANL he concurs with the LANL resource

allocation ... He believes it is reasonable for LANL to concentrate its efforts in what it believes.... [i.e., the KrF Aurora Target shooter program]." The security part of DOE states that Mascheroni lost the clearance because of serious credible derogatory information. "based on DOE's possession which raises serious questions about his continued eligibility for access authorization." However, after the OPM investigation released after April 1988, it is clear that the information introduced by LANL is false, and DOE did not follow guidelines. These answers really are in opposition to the facts. The KrF Aurora program has been cancelled and Mascheroni lost his access without following guidelines and with false information. "The question of Dr. Mascheroni's continued employment is between him and the University. I do not believe it would be proper for us to intervene.." However with a suspended clearance in his field of expertise where the funding source is DOE there is basically no employment.

On April 11, 1988, Director Hecker and Deputy Director Jackson meet with Mascheroni. Mascheroni informs them about the technical issues and that KrF Aurora is on the wrong track. He emphasizes the need for leadership in ICF and that an LMF has national priority. That HF is a technology that complements the ICF program because of the military and civilian applications. Mascheroni informed them that Henderson and Cartwright made many mistakes pertinent to Defense Programs. That Browne made a mistake when he stopped the C02 evaluation because it directly impacts the high efficiency laser technology. That Browne had to stop the HF proposal regardless of Canavan's recommendation because of his record of decisions. Hecker basically stated

that he would back his management and would not help with the Grievance resolution. Both managers, Cartwright and Henderson, have been removed from management, and are now highly paid technical staff members. ICF was turned over from Browne to Birely and then to John Immele.

On April 27, 1988, James Kane of the office of Vice President Frazer answers with copies to Gardner, Frazer, and Hecker: "The use of external peer reviews is of course an essential element of science and technology .... The responsibility for those reviews ... should remain at the local level, that is the Lab. The University delegates the technical management to the Director-The University does have oversight ... and part of this is carried through the SAAC ... and [I] rely on the committee to inform me if they sense problems .... But if they were to do so it would be the responsibility of the Director, and the University should not become involved."

In June 1988, the UC Scientific and Advisory Committee requested a meeting with Mascheroni. Mascheroni has very little time to prepare his presentation. Mascheroni prepares a set of viewgraphs at home with blanks that get filled in during his talk. Mascheroni is escorted for this meeting, and talk is classified by Lang.

On June 17, 1988, Mascheroni's grievance starts at LANL. Mascheroni is given access to his stored work for the purpose of the grievance. The initial request comes from Foley to DOE. DOE does not accept. The final request comes from Robertson. DOE permits access for Mascheroni's grievance.

In May-June 1988, the OPM informed Mascheroni that the

OPM report is finished, but OPM misplaced the copy for Mascheroni. Mr. E. Wagner from DOE, HQS requested DOE ALOO to make a copy of the report and to send this to Mascheroni. The OPM investigative report is a very important part of Mascheroni's case because it reveals important facts pertaining to the suspension of his access. In this report we shall not address the issues covered in some detail in Mascheroni's sworn statement to the Inspector General.

On June 28, 1988, Human Resources, C. Bivins through Director Foley writes a memo to Associate Director Browne on the LANL grievance determination. The subject is about Mascheroni "Request for a formal grievance hearing." The memo states: "Mascheroni received one security infraction on 05/14/87. ..As a background information about security infractions in X-1, the period between May 15, 1986 and May 15, 1987 members of the group were cited five times for infractions. Doug Wilson received two of those infractions and he received a third on 03/08/88. Kindel mentioned that Wilson also received at least one additional infraction when Kindel was the group leader ... Wilson did state that he gave security some incorrect answers when they were investigating the then alleged security infractions ... HRD could find no basis to support the intensive scrutiny of Mascheroni's compliance with security regulations while not imposing the same scrutiny on others in the group, especially those with record of infractions."

June 22, 1988, Lang gives first briefing on ICF classification to Mascheroni.

June 1988, DOE LAAO Manager, Harold Valencia, assigns

me, William Risley, to investigate the Mascheroni case.

July to September 1988, Mascheroni was involved with his grievance. The Hearing Officer, UC Professor David Feller, did not rule until November 1990.

In October 1988, Mascheroni goes to Washington where he visits with staffers for Congressman Dingell, Synar, Richardson, Spratt, and Senator Bingaman. He also visits the Argentine Embassy to request information about employment in Argentina. [The advice to search for a job in Argentina was given to him by his lawyer, Richard Harrington, after eight days of grievance hearings.]

In October 1988, Mascheroni files a Human Rights grievance against the Lab with the New Mexico Department of Labor Human Rights.

In June 1989, Human Rights decides that Mascheroni's case is strong enough, to indicate that he was discriminated against and issues a "Probable Cause" for discrimination on the basis of national origin.

Prior to issuing its determination, Human Rights tried to bring about a settlement between Mascheroni and the Lab, but the Lab refused to consider one. During this process Mascheroni was asked his conditions for settlement.

.The "Probable Cause" determination was made by the New Mexico Department of Labor/Human Rights Division, M. Sanchez Director on June 7, 1989. "After a careful review of all the statements on record on file, I find sufficient evidence

to believe there is probable cause on National origin discrimination and by a copy of this letter the respondent will be notified." After the determination the Lab hired a law firm to handle Mascheroni's case.

On July 1, 1989, Mascheroni writes to Admiral Watkins. This is a very detailed letter with extensive documentation addressing the technical issues, the upcoming NAS review, and the access issue. Copies of the letter go to NAS, UC, Congress and LANL.

On July 12, 1989, Mascheroni to Prof. Koonin, sending more unclassified work pertaining to the proposal for a HF LMF.

On July 19, 1989, the National Academy of Sciences issues an invitation to Mascheroni to participate in the national review of the ICF program representing the HF technology.

On July 21, 1989, LANL Deputy Director Jackson issues a letter to Mascheroni stating the limitations under which Mascheroni can access his work at the Lab to participate in the NAS review of ICF--15 working days, in isolation with access only to his own work and with no remuneration. Jackson states: "To the extend that you are granted limited access-such does not imply any employment relationship with the Laboratory. ..Rather it is for the sole purpose of permitting you limited access ..to prepare a presentation for the NAS ICF review. Accordingly any limited access granted to you will expire effective as of the date of your presentation, but in no circumstance will it extend beyond Nov. 30, 1989. ..If you desire to request limited access to the Lab under the terms and conditions set forth herein for the sole purpose of

preparing a presentation for the NAS ICF review, please so indicate by signing and dating in the places indicated below." Mascheroni did not sign in the "places indicated below."

On July 21, 1989, Mascheroni speaks with Dr. Chuck Gilbert, Deputy Assistant Secretary for Security Affairs, about adequate clearance and pay for participation in the NAS review. Gilbert tells him that Hecker called that morning. As to salary during the review, he can write to Hecker i and make his case, with a copy to DOE. The protocol is for Defense Programs to ask for a review of clearance and then for Security to address it. Mascheroni argues that since the OPM investigation was concluded and the work for an ICF review is equivalent to a job, DOE should make a determination on his clearance and issue a contract, if this is what it takes to fix his access. Gilbert did not tell Mascheroni that he could not get clearance and pay for the review. He suggested a letter to DOE Defense Programs, for them to request the clearance or a contract for the ICF review.

July 28, 1989, a letter from Lee Hunt, Staff Director for the NAS, informs Mascheroni that the Committee will visit Los Alamos on Nov. 1-2, 1989.

On July 30, 1989. Mascheroni writes to Hecker requesting ICF access and pay during the NAS review of the HF proposed program in order for the Academy to have adequate input on the scientific issues. "..it is puzzling that in view of the fact that the Lab, managed ny UC is custodian of all relevant data; the DOE is the funding agency for it preparation-and the NAS has requested presentation of the material as part of the national review, there is not some

means (i.e. a contract through the Lab) by which I could be remunerated for my time and presentation material during the period of preparation, presentation and follwup. Considering the level of investment the lab is making in its KrF presentations, what I am requesting would be trivial in comparison-I feel that it is reasonable to request a salary and full access during the period I will be working to prepare for the review presentation to the Academy. In fact in view of the Human Rights determination, the HF panel recommendations, and the fact that it was established during the grievance hearings that the X-1 RIF memorandum was based upon fabrications created by the X-1 management, the issue of reinstatement in a position of trust and responsibility as the principal investigator and manager for the proposed HF program should be a primary consideration." The distribution list for the letter includes DOE, NAS, UC and Congress.

On Aug. 2, 1989, Richard Hahn, Director of Weapons Research Development and Testing, DP writes to Mascheroni. He states that he is answering Mascheroni's letter of July 1, 1989 to Secretary Watkins. Mascheroni's letter requested that HF be included in the NAS ICF review and that consideration be given to provide for the best possible review of HF, including ICF clearance and pay for the participant. Hahn addresses the clearance. He notes that the NAS plans to hear the HF presentation, hence, DOE-ALOO will permit clearance as suggested by LANL, i.e., access for Mascheroni to his own files and data until Nov. 30, 1989. This letter does not address Mascheroni's letter of July 30, which was probably en route at the time.

August 8 1989, Deputy Director Jackson writes to

Mascheroni answering the letter of July 30. He states that the Lab is not in a position to accommodate Mascheroni's requests, i.e. pay and ICF clearance for participation in the HF review.

On about Aug. 10. 1989, Mr. Lee Hunt, Staff Director for the NAS, advises to Mascheroni that the NAS cannot get involved in issues other than inviting Mascheroni to participate to represent the HF option for fusion. He states that there is a contract between the NAS and DOE for this review and that Kahalas is the contact. He says he will call Kahalas and relay the need for access and pay, but it is up to DOE to resolve this.

On about Aug 15, 1989, Mascheroni speaks with James Randall and later with Deputy Manager James Culpepper, DOE ALOO, requesting guidance concerning access and pay for the review work.

On about August 23, 1989, Mascheroni writes to Congress, the President's Science Advisor, and Staff for the President.

On August 20, 1989 Mascheroni writes to Koonin informing him of the limitations imposed by LANL.

On about August 25, 1987, Mascheroni speaks with Mr. Steve Brown assistant to Dr. Gilbert, informing him that Gilbert is in Europe. Mr. Brown states that, for the NAS review, DOE could consider giving full ICF access and pay if the request is made through guidelines--perhaps by issuing a contract--but that he is not an expert. He states that his office does not handle day-to-day issues, and Mascheroni's is one of

these. He advises Mascheroni that he should talk to someone involved in access issues.

On about August 27, 1989, Mascheroni speaks with Ernest Wagner's office, with a woman associate whose name he does not recall. She states to him that the NAS could request a contract for Mascheroni and solve the access issue. A contract will imply a review of the security files.

On August 30, 1989, Mascheroni writes to Mr. Hunt conveying the information that DOE is willing to expand his access if the NAS will request it.

On September 12, 1989, NAS President Frank Press writes to Mascheroni. He states:

"Your letter of August 23, 1989, addressed to the President of the United States, which requested assistance in assuring an adequate representation of your views on the Hydrogen Fluoride laser to our Inertial Confinement Fusion Review Committee, has been routed to me for response. As a result, your request has been discussed at some length with our staff responsible for the review committee. I have been assured of the following: 1) Early in it's deliberations the committee unanimously agreed that your views and technical arguments regarding the HF approach to ICF should be part of its considerations. ..The committee's decision in this regard was accepted by the responsible representatives of the DOE and a letter from the committee chairman inviting a ninety-minutes presentation of your views at one of its meetings (now set for Nov. 1-3, 1989) was directed to you on July 19, 1989. 2) In order to assist you in preparing your presentation to the

committee, DOE has offered to grant you access to your classified material for a period of 15 working days. ..It is evident from your letter to President Bush that you would prefer broader access for a longer period of time. The NAS,..has no authority over such matters. It is an issue that must be resolved by officials in position of authority in the cognizant departments and agencies. (i.e. DOE)..I hope that the Committee may feel free to call on you between the November meeting and its final report should it require any elaboration on your presentation."

On September 15, 1989, Deputy Manager Culpepper writes to Mascheroni. "Even though DOE could allow you the proposed limited access, consideration of anything more extensive will not be undertaken in the absence of a "need-to know" (or contract] being certified for you by an appropriate DOE Headquarters ICF program official.."

On September 23, 1989, Mascheroni writes to Hahn and Kahalas. "It is my request that you consider expanding my need to know to full ICF access -- in view of the technical considerations -- and to allow me the opportunity for full ICF discussions with the NAS. I am sincerely hopeful that you will agree to this request."

On about September 30, 1989, Phipps states on January 4, 1991 to Mr. Bellows and DOE staff that he received phone calls and letters from his group leader Bigio and from his supervisor, Dr. Joe Figueira, telling him that he cannot represent the HF laser without risking his own funding.

On October 3, 1989, Mascheroni writes to Hecker requesting

permission for Claude Phipps to make presentations about HF to the NAS committee.

On October 11, 1989, Mascheroni writes to Congress, Bingaman, Domenici, etc.

On mid October, the Legislative Director for Senator Bingaman advises Mascheroni that the fact that he is originally from Argentina and that this is his background is against him. Ed McGaffigan advises Mascheroni to speak to Hahn directly.

On mid October Mascheroni speaks to Hahn by phone, who was in Albuquerque at the time. Hahn tells him "Without judging you, because they [the Lab] took your clearance you are a security risk. If I helped you, I would be the security risk and should be fired for that reason."

On October 24, 1989, NAS Executive Director Lee Hunt states in a letter "I have discussed the matter of broader access with DOE representatives. I have been assured that a need to know beyond that already offered will not be granted. Therefore, I suggest that you simply use a matrix approach to express your views with respect to different levels of driver energy. While I know that this is less than satisfactory to you, the Committee believes that this approach--coupled with its own access--will be adequate in judging the merits of the HF case." From Mascheroni's point of view this was extremely inadequate access for a national ICF review.

On October 30, 89. Albuquerque DOE manager Bruce Twining approves Mascheroni's 'IQ" clearance, with the

limitations requested by the Lab (10/23-31/89 and 11/1-2/89). Dr. Fenstermacher is listed as host.

In October 1989, Fenstermacher states to Mascheroni, Mansfield and Phipps that anyone has the freedom to participate in the HF review. Most of the scientists are afraid of retaliations by the Lab, regardless of the assurances.

October 1989, Mansfield states to Mascheroni that has spoken with his boss, Gary Allen, and that he was warned that Allan could not protect Mansfield from being without funds.

In late October 1989, Canavan's secretary informs Mascheroni of a death in Canavan's family and that he will not be able to participate in the NAS review as planned.

October 20, 1989, Mascheroni receives a letter from Jackson answering the October 3, 1989 letter to Hecker stating that "..the NAS is an independent organization. It is not proper for the Laboratory to extend such invitations ... Of course any presentation by Mr. Phipps would be done in his individual capacity and not as a representative of LANL."

October 27, 1987, letter from Birely to Mascheroni. "Drs. Canavan's and Mueller's participation...is a matter between them and the Review Committee...As you know your access to your classified records was arranged by DOE/Albuquerque operations

.Office and we are operating under this guidance .... I do not have adequate justification to recommend to Deputy Manager Culpepper that they be released to you."

On November 2, 1989, a 90-minute presentation to the NAS is scheduled. Mascheroni presents about 110 viewgraphs in 40 minutes. Mueller gives a 10-minute presentation on the C02 Antares data. Mansfield addresses Phipps, design in about 15 minutes. Mascheroni believes the time was absolutely insufficient. Questions come from the panel, notably Professors Rosenbluth and Happer, about why the evaluation of C02 was not completed. Prior to Mascheroni's presentation, Birely warned the audience that Mascheroni did not have ICF access and that the audience should protect Mascheroni. Phipps was called at the end for few minutes to answer some questions from the NAS.

On November 20, 1989, Mascheroni writes to Prof. Steven Koonin and his panel about the ICF program at Los Alamos in view of the fact that the NAS will be reviewing the management of the national ICF program. Mascheroni notes that the GAO is helping in this review process. An issue is that LANL does not want to allow Mascheroni back at the Lab to organize the viewgraphs he used for the presentation in order to send them to the NAS meeting in San Diego at General Atomic in December. Mascheroni notes that both Hunt and Elizabeth Tucker (of the NAS) pursued the request with LANL (Cartwright). In this letter, Mascheroni summarizes the situation pertaining to his request for a fair review of HF. The concerns are full ICF access, pay, and adequate participation in the national review without retaliation for the other scientists involved. He notes: "Livermore and the ICF community--which includes LANL--have infinite resources compared with those of us involved in the proposed HF program. Under the present conditions -without funds or salary-- this could hardly be

called a fair review of the proposed HF program. I am operating with no resources."

Mascheroni suggests how a contract could be generated for the review of HF. In addition, Mascheroni suggests that the NAS panel prompt the University to get a grievance ruling from Prof. Feller. Mascheroni's ICF theory is based in part on Mueller's data from Antares. Referencing Prof. Happer, Mascheroni states: "The question by Prof. Happer about Antares shutdown will be addressed in detail in the letter about management." and "I hope to mail the classified viewgraphs I used in my talk with a classified cover document for the classified part of the proposal, to you, if my access is approved. I trust the NAS may be able to obtain adequate conditions for the HF review." The letter has broad distribution including the NAS panel, Congress, UC , DOE and GAO.

On Nov 26, 1989 Mascheroni speaks with Mr. Culpepper about the access issue in order to send the viewgraphs.

On Nov. 28, 1989 Culpepper approves the access "pursuant to your request to use the facilities at Los Alamos National Lab, I hereby authorize you limited access to LANL from Nov. 29, 1989 until close of business on Nov. 30, 1989. This authorization is for the purpose of developing a summary document, e.g., viewgraphs, related to your presentation to the NAS."

Nov. 29-Nov.30, Mascheroni is at the Lab. He is given a desk below a set of telephones in the classified archives with inadequate illumination to prepare material to be sent to the

NAS for the national review of the ICF program. Behind him there was a security officer. The telephones were noisy and were in use constantly.

Dec. 4-6, 1989, the NAS meets in San Diego to write the interim report issued in January 1990. The HF/Mascheroni classified report and viewgraphs sent from the Lab arrived at this meeting late, after Livermore's proposal. The Academy staffer (Dixie Gordon) informed Mascheroni that the panel was really addressing the Livermore proposal, and that they had no time to adequately address the 100 viewgraphs and report for HF. The NAS interim report was sent to DOE for classification. Information received after this meeting could not be included in the report.

On January 6, 1990, Mascheroni writes to Koonin and the NAS panel about the "Record of Managerial Decisions Pertaining to the Antares/C02 Shutdown, HF, LMF, ICF and Reprisals." The documentation appendix is about 400 pages. He writes "I have collected some memos about the evaluation of Antares and pertinent issues (such as HF) which reveal a record of managerial decisions by LANL which is quite obviously biased for Aurora KrF. This complements the previous material that we have sent to you pertaining to management. I recall sending Prof. Happer documentation on these issues sometime in 1988". The memo addresses in detail the Antares shutdown by Associate Director Browne after management recognized that a new, improved regime was discovered for C02 Antares. The reason given by management on March 24 1986 is that they want to put all the ICF funding into the KrF Aurora target shooter and to use the space for CTR.

Mascheroni addresses in detail that CO2 was not evaluated in the long pulse experiments. Mascheroni addresses the LANL presentation of May to the NAS: "One of LANL's presentations to the NAS panel during the 1985 review was made by Dr. P. Goldstone, P-4 group leader. He explained the data from Mueller, et al, which was incomplete at that time...This description was completely in error and was disturbing because Mueller's data included time-resolved hot electron temperature..." Mascheroni states: no other board that can address the record of managerial decisions at LANL, and because there is a need for scientific expertise, particularly with respect to HF, to be brought to ICF. We believe that the scientific integrity at LANL is a very important component for a successful ICF program. Management does not need to retaliate and to use fabricated issues to silence us. I am enclosing a letter from Prof. Feller, of the UC, which states that UC and LANL do not have any recourse in the grievance process for an individual to bring technical issues to a hearing with the hope of producing a correction to a program. It should be noted that LANL denied Prof. Feller the opportunity to see the job appraisals and evaluations for the X-1 group in order for him to make comparative analysis. Enclosed you have a roster from the group to identify the contributions made to ICF by the theory gropu at LANL." Full documentation is also given to President Frank Press and Prof. Happer.

On About January 1990, Mascheroni speaks with Mr. Dwayne Fitzgerald of the GAO, who was in the NAS Nov. 2 presentation. Fitzgerald understood that the Centurion Halite data may contradict a low energy approach in ICF.

on about January 12, 1990, Mr. Hunt informs Mascheroni that the issues raised to the panel on January 6, 1990, should be left for the GAO investigation. He notes that there is a contract and that the NAS cannot address the record of LANL decisions but that the GAO can.

On about January 12, 1990, Mr. Hale of GAO informs to Mascheroni by phone that GAO cannot address technical issues pertaining to the Antares shutdown or the high efficiency vs low efficiency technology for ICF. They will go with the interim NAS report on the technical issues.

On January 19, 1990, Mascheroni writes to General Monaghan Director SDIO about a ground based DF SDI system for SDI [45] applications. The application is protection "against the accidental launch of missiles against the continental US." He requests consideration for the possibility that the NAS address this application in the current ICF review.

On February 15, 1990, Mascheroni receives the NAS interim report. The report favors Glass and the KrF Aurora target shooter program and is against any HF research.

On about February 17, 1990 in a phone conversation Koonin advises Mascheroni to write to him about the technical issues pertaining to the interim report.

On February 28, 1990 Mascheroni writes to Koonin and his panel about the technical issues pertaining to their interim report. Mascheroni writes: "This letter attempts to state our priorities clearly, and to respond to the principal negative

comments of the Panel concerning HF. We encourage the panel to make further inquiry and to direct questions to us." Mascheroni addresses each paragraph of the recommendation and contrasts this with the Canavan panel's recommendation. In one of the appendices to the letter Mascheroni addresses the "KrF Aurora" target shooter program show stoppers in detail:

"The arguments against KrF are well written in a memo by Murray et al..

'Thus to summarize, KrF is not a laser which is naturally suited for inertial fusion Aurora has not validated multiplexing... Certainly more work is required to determine if KrF could ever be used for fusion-However it will take very significant investment in time and money to get it there..'

We addressed many of the same points in a memo to LANL management in 1985. The KrF program does not appear to be a fallback option..Did the NAS panel meet with the Aurora project managers?,..The present Aurora design has flaws which cannot be resolved as simply as the NAS states in the recommendations. The chances are too great that Aurora will continue to be a money sink without achieving the milestone set forth by the NAS report ... NAS is recommending an effort with the projection that it will produce a 20 kJ Aurora target shooter in 3 years ..The Aurora system can not be made into a reliable system..This point can be resolved by technical discussions between the NAS and the technical personnel..In our presentations of March 10, and our memo of March 21, 1986 to LANL upper management we addressed some of the Aurora shortcomings...We mentioned

some of the issues to the DOE-DIF Director in early 1988...The NAS panel states: 'With the steps we have outlined above, Aurora will become an excellent implosion facility..' This is not realistic. The KrF laser system is too complex and too costly....."

Mascheroni notes the Japanese work on HF. In appendix B of his letter Mascheroni outlines a 5-year HF program.

On March 10, 1990, Mascheroni writes to Mr. Rezendes of GAO about Waste and Mismanagement in the ICF/KrF effort at Los Alamos. Mascheroni notes that the interim report from the NAS pertaining to the Los Alamos ICF program is vulnerable. Rezendes later tells Mascheroni to send the material to Fitzgerald.

In late March 1990, the GAO, Mr. Hale informs Mascheroni that GAO does not have the capabilities to address technical issues concerning the Antares shutdown and that they will go with the NAS interim report. The GAO report based on the NAS interim report does not address the fact that Antares C02 was supposed to complete the evaluation in the long pulse multiline regime. The GAO report addresses only reviews done in the single line short pulse regime where hot electrons are a show stopper. It should be noted that the NAS interim report recommends the KrF Aurora program, i.e. LANL program, while the NAS final report is against the KrF Aurora target shooter program. The Albuquerque Tribune, which published many articles on ICF states on August 27, 1990: "He [David Berick a congressional staff] described the technical reviews cited by Birely, as 'self serving' since they were based on information supplied by Los Alamos and did

not benefit from dissenting views. 'This thing gets pretty circular if you really look at it,'Berick said. Synar requested the GAO investigation, which found Los Alamos had given the Antares decision adequate' review. But Berick said 'I do not consider the GAO report definitive, which is to say it's not the last word. In fact based on what I know so far I would come to some very different conclusions than the GAO.' Regarding Antares he said the reviews cited by Birely and GAO were made before unexpected results were achieved in Antares. 'Some of these actions just don't hang together very well' he said. Birely said Antares' fate essentially boiled down to a 'business decision'.' During 1991 Associate Director Birely left his AD position at the Lab.

During March 1990 Mascheroni has phone conversations with NAS panel members, Profs. Rosenbluth, Dawson, Conn, Davidson, Rapper, and others. Mascheroni recognizes need to answer many questions, especially those from Prof. Rosenbluth on March 19 which formally summarize the scientific questions from the panel. Prof. Rosenbluth makes the point that the security issue against Mascheroni is hurting him. He emphasizes that this should be an issue to be resolved as soon as possible because the panel and DOE were too sensitive about this issue. Mascheroni tells Rosenbluth that he will find a way to solve it. One member of the panel, who asked not to be identified on this issue, specifically stated to Mascheroni that the NAS will never give funding to a scientist who has had his security access suspended because that would mean giving funding to a security risk, which would contradict DOE and NAS thinking.

On March 25, 1990, Mascheroni writes to Prof Koonin and

his panel summarizing the questions from Prof. Rosenbluth about Filamentation, Energy Transport, Cost, Optics, Electrical Efficiency, and Cycle System Efficiency, etc. He states that he will be mailing the answers in the near future.

In about May 1990, Mascheroni goes to DOE ALOO and speaks with Mr. Culpepper about the need to answer the NAS questions. Mascheroni explains that he is working on a report to the NAS, that he needs a salary and access, and he asks for a review of his security file and determination because the security issue i hurting him and the HF part of the ICF review.

In about May- June 1990, Mascheroni makes a similar request to Mr. J. Tillman, Manager, LAAO.

On July 1990 a Congressional Staffer, Mr. David Berick, visits Los Alamos, the Lab, and Mascheroni.

On July 19, 1990, Mascheroni sends a letter to the NAS panel. "Enclosed, please find the Executive Summary, in additions to Sections II and IV of the HF LMF proposal. I have spoken with Prof. Rosenbluth and Mr. Lee Hunt. I understand that the request was made by Prof. Rosenbluth to Dr. E. Storm for technical review of the proposal and he accepted ... Drs. R. Bangerter, Ray Kidder, E. Lindman, are on the list of those whose comments may be of value to the NAS panel. I am sending this document in advance because the main body must go through a declassification process ... and should be mailed on July 24, 1990."

On July 28, 1990, Mascheroni writes to the panel: "I am addressing the questions pertaining to the HF LMF target

design in some detail .... I have spent several months working at home preparing this document using open literature. The numerical estimates can be checked against the LASNEX calculations presented to the NAS ... As you may know, we are requesting three hours for the defense of the HF proposal." This is a 202 page report. Mascheroni sent copies to the NAS panel and all the referees, totaling 25 copies.

On about July 29, 1990, Mascheroni requests to LAAO to classify his addendum to the report, which was needed to understand his report.

On about July 31, 1990, Mr. C. Demos, of Classification ALOO, requests the complete report to the NAS.

On Aug. 23, 1990, Mr. Hunt of the ICF Review Committee writes to Deputy manager Culpepper:

"On Aug. 29-30, 1990 the ICF Review Committee of the NAS will hold its final meeting. ..Since the final report of the Committee is due on September 15, 1990, this will be the last opportunity ... for clarifying remaining issues ... In this vein, we have asked Dr. P. L. Mascheroni, and any of his colleagues he requires for technical assistance, to meet with the Committee from 1500 to 1600 on the afternoon of August 29. our purpose in this invitation is to gain clarification ... on several technical areas raised by Dr. Mascheroni in his proposed HF approach for ICF.

In order to respond adequately to the Committee's questions Dr. Mascheroni may need to make references to classified data. While we fully understand ..However this (access] issue

can only be resolved between Dr. Mascheroni and the proper authorities in DOE..."

On August 28, 1990, manager Twining of DOE ALLOO, writes to Mascheroni: "Pursuant to ICF Review Committee request for you to attend the final meeting on August 29, 1990, at the Sandia National Laboratories, Albuquerque, I hereby authorize you limited access on that afternoon only during the time which is necessary to respond to questions raised by the Committee and to clarify issues raised by you in your HF approach to the committee..."

On August 17, 1990, Dr. W. Herrmansfeldt of Stanford Linear Accelerator Center writes to Mascheroni advising that the Fusion Policy Advisory Committee will recommend funding for HF if the NAS recommends funding for HF.

On August 29, 1990, Mascheroni and colleagues, Drs. Canavan, Lindman, Mueller, Mansfield, and Phipps answered questions from the Academy. Dr. Mascheroni made it clear that if new questions arose he would need one week to provide the answer. Dr. Rosenbluth asked Canavan what were the reasons for him to change his mind about HF. Canavan acknowledged that when he was the IF Chief at DOE he was against HF, however, after Mascheroni's work and new experimental data this position was no longer valid. There was no technical opposition, but the issue of the lack of institutional support was addressed for the first time at this meeting. At the end of the presentation, Professor Rosenbluth came to Mascheroni and advised him to publish the HF report as a review paper. He noted that Mascheroni had original contributions in the report.

On September 15, 1990, the NAS committee issued its final report. They state in this report:

"In addition, the laboratories provided written responses to detailed questions from the committee. Although chemical lasers are not part of the current ICF Program, the committee also allowed time for two presentations on the HF laser and reviewed extensive documentation on that approach." [p. 2)

"Given the absence of ... any institutional support we do not recommend starting a new HF driver program." (p. 15]

"The proponents of an HF laser driver have done a remarkable amount of work on a very small budget, and while they have made an arguable case, it is far from a compelling one ... In such a complex situation an experimental database is essential. Obtaining one would require developing a novel large laser.." [p-15]

"Indeed if it turns out that a 100 MJ (class] driver were required (thus that Mascheroni is right) one would have to rethink the entire approach to, and rationale for, ICF."[p. 15]

About Los Alamos National Lab we find:

"Our perspective on the role of LANL in the national ICF Program has changed greatly as a result ... of our closer scrutiny of Aurora's capabilities. In our Interim Report we made the following observations and recommendations concerning the LANL program: " ... Within two to three years an additional 48 beams can be brought to target ..so that full implosion campaign can be undertaken ... With the steps

we have outlined above Aurora will become an excellent implosion facility ..

It now appears that it would be too difficult and expensive to activate the additional 48 beams and enable implosion experiments ... the resulting ablation pressures would be smaller by a much larger factor ... Additional limitations of Aurora include ... Also, earlier Novette experiments at 4w demonstrated (in 1984).. at much higher intensities than are possible with Aurora ... The single sided illumination geometry of Aurora limits most types of hohlraum experiments.. Given this perspective and the fact that Aurora just began.." [p. 18-191 . The Aurora KrF target shooter program has been stopped after this recommendation, which indicates that Mascheroni was right.

On September 26, 1990, Demos advised that Mascheroni's report is classified at several sigma levels. I communicated this to Mascheroni and all the copies and pertinent material was destroyed and/or given to DOE.

On September 27, 1990, I obtain a list of all the people the report was sent to--they are all "Q11 cleared-- I wrote to all 25 and advised of the upgrade and for them to advise us what steps they plan on taking to protect the report.

On September 27, 1990, Mascheroni wrote to Congress. Bingaman, Richardson, Spratt, and Synar:

"We have verified our credibility within the ICF community ... we have tried to stop the Aurora/KrF program..During 1985, 1986, and 1987 we made presentations at LANL explaining

that Aurora had serious show stoppers.. "

This is a 14-page document that clearly shows that the NAS could not have adequately evaluated Mascheroni's work because of the suspension of the access and the lack of funding.

"The committee seems to give equal value to compelling arguments and institutional support. We submitted a detailed 200-page report...From the presentations and conversations with committee members there was no technical issue to which we did not respond in defense of our position .... The committee did not have technical issues to discuss and chose to address lateral nontechnical issues such as the lack of institutional support [or access issue pursued by LANL] ... The work we have done for the HF review was done without budget and against LANL institutional support. The committee writes that we have an arguable case, however, the Canavan panel recommended funding ... There was no possibility for critical feedback to be provided to the Academy ... The possibility that drivers with energy greater than 10 MJ may be necessary for pertinent gains was not addressed in the report nor even discussed..."

By October 1990, all the reports are accounted for and the incident is closed.

In October 1990, Mascheroni visited me at DOE-LAAO requesting pay for the work done during the NAS review and the fact that his work has been classified and he cannot use it for publication as Prof. Rosenbluth recommended. Mascheroni noted that the work was new theoretical work

not previously done at the lab and that he had spent a considerable amount of time working at home to produce it. He had written the report during a period of three months. Mascheroni stated that without access it was very difficult to find a job in his field of expertise, and that he will be forced to either return to Argentina or to generate an offer from Japan or in Europe. He reviewed extensive documentation pertinent to his access. He stated that the suspension of his access due to false information in the security system damaged not only his career but also the NAS ICF review. I then decided to make a careful review of the facts and studied my notes and read his security file and the OPM investigation.

On November 8, 1990 I wrote a summary of my determination about the Mascheroni case in a memo to DOE Manager Jerry Bellows.

On November 19, 1990, UC Professor Feller made his recommendation. "On the basis of all the testimony presented I conclude that the overall pejorative judgement as to Dr. Mascheroni's abilities expressed in the narrative is at best overstated and at worst simply false ... I will address first the concededly erroneous statements in the narrative. It said that he was assigned to work on documenting his C02 work but, rather than doing that he had chosen to pursue the HF laser. In fact, he had already completed the assigned task of documenting his C02 work before his assignment was finalized in September 1986 .... The first request in his grievance was that "all of the RIF related memos" be deleted from his personnel records. Since I have found that it contains erroneous derogatory statements about Dr. Mascheroni's competence, I believe that the grievance should be granted in

this respect ... The RIF narrative from Group X-1 management dated January 26, 1987 and the supplementary narrative from Doug Wilson dated February 23, 1987 relating to Dr. Mascheroni and Dr. Hendersons's narrative relating to him dated January 27, 1987 should be removed from Dr. Mascheroni files and all other laboratory files..The lab should reimburse Dr. Mascheroni for all fees and all cost.." However Director Hecker overruled Feller on the cost issue.

In December 1990, Mascheroni formally requested that Admiral Barr give the HF group the chance to give a presentation about HF at DOE Headquarters.

On January 4, 1991, Mascheroni, Phipps, Mueller, Lindman and Mansfield made a presentation about the HF proposal to DOE-LAAO Manager Bellows. I was present as was Mr. Tillman. During the presentation, Dr. Phipps stated that he was told by LANL management that if he presented his work on HF to NAS that his funding would be cut off. The title of the talk was " National Security Concerns Suggest the Need for an Administrative and Scientific Review of the HF Laser Driver for Funding Recommendation." During the presentation, Mr. Bellows stated that he was going to try to help. He suggested that the scientists write to Basic Energy Sciences at DOE.

In January 1991, Mascheroni wrote to Watkins following Bellows' suggestion.

In February 1991, Dr. Ray Kidder from LLNL, one of the inventors of ICF, visited Los Alamos and Mascheroni. I was privy to a group meeting with Dr. Kidder and the HF

proponents. Mascheroni and the group made clear to Dr. Kidder that the NAS could not have reviewed chemical lasers due to the limitations. It was clear to me during this meeting that Mascheroni is one of the dominant and leading scientists in this ICF field. Dr. Kidder suggested a classified discussion about HF and the use of scientific issues with DOE. I got approval from Mr. Rush Inlow, DOE-ALOO, for Mascheroni's "Q" clearance for the meeting with Kidder at DOE. I also spoke with Dr. S. Kahalas who mentioned that he did not know who was right with respect to the fusion controversy.

On February 8, 1991, Dr. Kidder and Dr. Mascheroni met at DOE-Los Alamos for about 2-hours to discuss ICF.

Around late March 1991, Mascheroni tried to meet with Mr. Victor Stello, Deputy Assistant Secretary for Facilities. However, Stelio did not stop at DOE LAAO and the meeting was cancelled.

On April 3, 1991, Representative Dingell asked Secretary Watkins about Mascheroni's access. Note that on October 1989 he asked the same question to Secretary Watkins. In fact, on November 10, .1988 Mr. Dingell wrote to then Energy Secretary John S. Harrington with the same question.

In July 11, 1991, Mascheroni wrote to Secretary Watkins and Inspector General Layton. Mascheroni argues that there was an implied contract from DOE and there was a financial obligation to him. "By invitation, it was implicitly agreed, given the authority vested in the NAS for review, that DOE would pay me for my work during the national review ...

Following this presentation the document was classified by DOE. It was confiscated from my home by DOE security chief [at that time] Mr. William Risley and treated as government property. ..The quality and amount of the work was clearly acceptable to the NAS. The NAS states, 'Although chemical lasers are not part of the current ICF program the committee allowed for two presentations on HF and reviewed extensive documentation on that approach.' I am hereby requesting payment by DOE for my work in ICF performed for the NAS's review of the ICF program commissioned by the Secretary of Energy." It should be noted that Mascheroni did not sign the July 21, 1989 letter from the LANL which stated the he would not receive pay for his work during the NAS review. In addition DOE never stated to him that DOE will not pay his work for the NAS. It is also clear that the DOE used the NAS report which used Mascheroni's work, and all the participants were paid.

Determination and Recommendation

On September 1984, LANL decided to terminate the C02 Antares program without evaluation in the long pulse multiline regime in favor of the Aurora KrF target shooter program. Mascheroni had a theory developed several years earlier showing that high efficiency multiline lasers could have significant advantages over the low efficiency short wavelength approach to fusion. Mueller's data in the long-pulse, double-line Antares experiments confirmed Mascheroni's theory. Mansfield believed that Antares could reach energies at the same level as NOVA today. Hence, Mascheroni, Mansfield, and Mueller were a natural team. LANL made a decision which proved to be in error, namely,

to pursue only the KrF Aurora laser and to destroy Antares without evaluation. The reasons for this decision were given in the memo of March 24, 1986 by Associate Director Browne: That ICF funding should go to the KrF Aurora target shooter program and that the Antares hall space was needed for CTR. Both programs have been cancelled, and the data from the Japanese HF laser, Mueller's long-pulse experiment, and Centurion-Halite support Mascheroni's case. This is consistent with the fact that the Canavan panel recommended funding for the Mascheroni/HF program. However, the LANL ICF management opted to pursue only the KrF Aurora target shooter program and the X-Division Management chose to fire Mascheroni, before the Canavan panel issued its recommendation, regardless of whether HF could receive funding.

Thus LANL used false reasons to RIF Mascheroni. This was discovered in Laboratory grievance hearings, where the hearing officer recommended deletion of all the RIF-related memos about Mascheroni. Wilson and Henderson brought trumped-up security issues against Mascheroni and put false information into the security system. After he was RIFfed, they pursued security through OS and the LANL OS-Division Leader put security flags on Mascheroni's file that would bring about the suspension of his access. Because of the nature of this false, derogatory information from LANL management, DOE decided to suspend Mascheroni's access without following guidelines. After a successful review of his proposed program by the Canavan panel, Mascheroni was blocked from pursuing funding through DOE. While Mascheroni tried to pursue HE funding from a lower level job at the Lab, with his access suspended, any RIF meant

termination for him, not only from the Lab, but also from ICE. Without a job and with suspended access, Mascheroni helped to generate the request by Congress for the ICE review by the NAS. His technical input helped to correct LANL's error in pursuing the KrF/Aurora target shooter. By cancelling the KrF Aurora program, the nation now has a better ICE program than it had a few years ago. Unfortunately, considerable funds were lost with this mistake. In the process, Mascheroni earned the respect of the ICE community with his defense of the HE laser technology without funds or access. In a field which is 90% classified with only one major funding agency, however, the security issue produced by false information and the conflict with LANL has been devastating for him. Furthermore, during the national ICE review, under such conditions, it was impossible for the NAS to perform a thorough evaluation of the HF/Mascheroni proposal. This fact hurts the credibility of the national ICF program, especially because it has become evident that Mascheroni is a first class scientist.

Currently, the NOVA Upgrade program at LLNL is under fire because of Mascheroni's objections to this low efficiency, expensive, short wavelength technology that cannot afford the punch to reach ignition and low gains. Regardless, of the funding limitations, the ICE program would be better off incorporating a technology that could reach those higher energies economically due to the fact that it has, historically, been short of energy. The correct solution is evident in Mascheroni's case. DOE should reinstate his clearance immediately because the information used to suspend it was false, in order for him to continue the scientific discussion on a legitimate level. In view of the fact that there are no show

stoppers for his HE proposal, but a lack of institutional support, DOE and Congress should help Mascheroni with funding for this program. DOE should pay Mascheroni for the work he has already done during the NAS review, in view of the fact that DOE severed his salary for nearly 4 years by suspending his access. His work has been of consistently high quality and has been very useful in the preparation of the NAS report and, thus, to DOE. The very slow administrative remedies will take care of rest. Certainly, the alternative--to force him out of our nation because of false information pertaining to security and his scientific skills--is the worst alternative.

William A. Risley
Security Officer
SNS/LAAO, DOE

"IN CONFIDENCE"

Los Alamos National Laboratory
of the University of California

Los Alamos, New Mexico 87545

February 8, 1991

Dr. P. L. Mascheroni
1900 Camino Mora
Los Alamos, NM 87544

Dear Dr. Mascheroni:

After carefully reviewing the Hearing Officer's report of November 19, 1990 and examining the briefs and portions of the hearing transcripts and exhibits, I have independently concluded that your grievance, both as originally stated and amended by counsel, shall be denied in its entirety except as noted below.

I concur with the Hearing Officer's conclusion that you were an appropriate reduction-in-force candidate from X-Division and therefore should not be reinstated. The Hearing Officer reaffirmed that the University of California Staff Personnel Policy 760.11 does not apply to reduction-in-force proceedings at the Laboratory. Our procedures and criteria are carefully spelled out in the Laboratory's Administrative Manual and in Director's Office reduction-in-force guidance. The Hearing Officer found that ample evidence supported the criteria that were crucial to your being selected as a reduction-in-force candidate. In examining the question of whether management acted improperly in determining to eliminate you rather than someone else from Group X-1, he concluded "The conclusion must be that, on

the evidence introduced, there was no showing that management's decision on that question was improper." Based on my review, I concur in that conclusion.

The Hearing Officer also concluded that there was no evidence that your termination from X-1 was motivated by discrimination based on your national origin. On the matter of decisions surrounding the choice of scientific research in the inertial fusion program, the Hearing Officer stated what he believed was the appropriate approach: "That the management of the Laboratory has the right to manage the Laboratory. It does not have the right to prescribe the results of the scientific research it requires to be performed." He stated that "There is ... no evidence whatsoever that [Laboratory management) attempted to prevent Dr. Mascheroni from expressing his views" and he concluded that "the claim that there was a violation of Dr. Mascheroni's academic freedom is ... unfounded." Based on my review, I concur in these conclusions.

The Hearing Officer stated that "the question of whether Dr. Mascheroni's security clearance was properly suspended is not an issue in this proceeding." I concur. The Hearing Officer also examined the issue of whether your removal from Group X-1 to Group N-9 constituted a "constructive discharge." His answer was no. In his words "To conclude that what was essentially a transfer from Division X to Division N in this case constituted a constructive discharge, however, would require that I find that the work to which Dr. Mascheroni was assigned in Division N under Dr. Hirons was not scientific work commensurate with his skills and competence. No

evidence was offered with respect to that question and I cannot therefore conclude that Dr. Mascheroni was constructively discharged." I understand this to mean that the evidence did not persuade the Hearing Officer that the employment in Group N-9 constitutes a constructive discharge. Based on My review, I concur in that conclusion.

The Hearing Officer recommended that the RIF narrative from Group X-I management dated January 26, 1987, and the supplementary narrative from Dr. Wilson dated February 23, 1987, relating to you, and Dr. Henderson's narrative relating to you dated January 27, 1987, should be removed from your personnel file and all other Laboratory files with the notation that they were removed at my direction pursuant to the Hearing Officer's recommendations. I concur with this recommendation. All of these copies will be removed from Laboratory files and retained only by Laboratory Counsel. A memorandum will be placed in each file from which those narratives were removed, stating that they were removed at my direction in accordance with the recommendations of the Hearing Officer.

The Hearing Officer recognized that he did not have the authority to consider the question of your 1986-1987 performance appraisal. However, he nevertheless suggested that it be removed from your personal file because it contained some of the statements made in the RIF narrative. In the interest of consistency, I will also direct that your 1986-1987 performance appraisal be removed from Laboratory files and retained by Laboratory Counsel. A

memorandum 'Will be placed in each file from which it was removed, stating that it was removed at my direction.

The Hearing Officer stated in his findings that "the RIF narrative contains erroneous derogatory statements about Dr. Mascheroni's competence ,... The Hearing Officer went on to observe "If the placement of Dr. Mascheroni on the RIF list in Division X were based solely on the narrative and if the false statements in the narrative were critical to that placement there would be force in counsel's contention that the false statements should, without more, be the basis for granting Dr. Mascheroni's grievance. The facts, however, are to the contrary."

From the extensive documentation and hearing records it is apparent that you were a difficult employee to supervise which may have contributed to a rather harsh RIF narrative. Based on My review, I concur fully with the Hearing Officer's comment which I believe represents the bottom line, "In perhaps the most important respect the narrative was completely accurate. The conclusion that Dr. Mascheroni is 'inflexible and has little probability of successfully transferring to other Work' and that 'he will only work on problems that he is interested in' are amply justified by the record. His employment history, as detailed above, demonstrates this unequivocally..." Hence, I reiterate that I will deny your grievance with the exception of removing the above referenced RIF narratives from your personnel files.

I do not adopt the Hearing Officer's third recommendation to reimburse you for all fees previously paid to the Hearing Officer and all costs actually incurred for the preparation of the transcript (not to include attorney's fees). Laboratory Administrative Manual Section 111.16 provides

that the fees of an outside hearing officer will be born equally by the parties unless the officer's recommendations are substantially rejected. This is obviously not the case here since I agree with the Hearing Officer's recommendations. We have also consistently applied this policy in the past and, therefore, deny reimbursement.

"IN CONFIDENCE"

"IN CONFIDENCE"

Finally, I trust that, having received a thorough review of your grievance by a distinguished law professor of your choosing, you are now convinced that you were treated fairly by the Laboratory. I regret the fact that this process took so long. As you know, the case was very extensive because of the huge amount of information introduced and it was delayed because of some unfortunate health problems experienced by the Hearing Officer.

Sincerely,

S. S. Hecker
Director

SSH:dl

Cy: Richard Harrington, Esq.
Rosemary Thompson, HRD-1, P233
Christine Gray, LC/GL, A187

"IN CONFIDENCE"

BEFORE

DAVID E. FELLER, HEARING OFFICER

In the matter of

Pedro Leonardo Mascheroni,

Grievant

and

University of California,
Los Alamos National Laboratory,
Respondent

REPORT AND RECOMMENDATION

Appearances:

For the grievant:	Richard Harrington Chandler, Wood, Harrington & Maffly
For the laboratory:	Christine F. Gray, Staff Attorney

Chronology:

August 20, 1979:	Grievant employed
February 4, 1987	Notice of RIF to grievant
March 6, 1987:	RIF
May 11, 1987:	Grievance
July 5-8, 1988:	Hearing, First Session
Sept. 24-27, 1988:	Hearing, Second Session

Dec. 15, 1988:	Transcript delivered
Apr. 3, 1989:	Grievant's opening brief
July 14, 1989:	Laboratory brief
Aug. 15, 1989:	Grievant's Reply brief with motion to reopen hearing
August 17, 1989:	Request for offer of proof
Oct. 12, 1989:	Grievant's offer of proof
Oct. 16, 1989:	Denial of motion

Witnesses Called by Grievant:	Hearing Transcript Vol.
Joseph Kindel	1st Session: I, 2d Sess: I and II
Thomas Hirons	1st Session: II
Erik Lindman	1st Session: II
Reed Jensen	1st Session: II
Claude Phipps	1st Session: II
Marvin Mueller	1st Session: II
Charles Mansfield	1st Session: III
John F. Kephart	1st Session: III
Gregory Pollock	1st Session: III
R. Gary Lee	1st Session: III
John L. Norton	1st Session: III
Aba Eli Sandoval	1st Session: III
Phillip Lang	1st Session: III
Charles W. Cranfill	1st Session: IV
Gregory Canavan	1st Session: IV
Leonardo Mascheroni	1st Session: IV, 2d Sess, I and IV
Armando S. Vigil	1st Session: IV

Witnesses called by Laboratory:

Michael Henderson	1st Session: II
Gary Weber	2d Session: I
Douglas Wilson	2d Session: II, III and IV
William Mead	2d Session: III
David W. Forslund	2d Session: IV
David Cartwright	2d Session: IV

Overview

As indicated in the above chronology the grievant, Pedro Leonardo Mascheroni, was employed as a theoretical physicist by the Los Alamos National Laboratory in August, 1979. He was assigned to what is now known as Group X-I (Inertial Fusion and Plasma Theory) in Division X (Applied Theoretical Physics). In the fall of 1986 it became apparent to the laboratory that its available funding would require a reduction in force. Detailed instructions as to the guidelines to be utilized in selecting those staff members to be RIF'd were issued by James F. Jackson, DDO, on January 20, 1987. Michael Henderson, leader of Division X, was instructed to select 18 members of the Division for possible reduction. He allocated the required number of RIF candidates to each of the groups within X-1 and transmitted Jackson's guidelines to the leaders of each group. Douglas Wilson, group leader of X-1, was instructed to select two members of his group for possible reduction in force. Wilson, deputy group leader Mead, and section leaders McVey, Wingate and Gary Lee jointly screened the members of the group purportedly using the guidelines specified by Jackson and, after three successive screenings, selected the grievant and one other staff member of X-1 as RIF candidates.

Narratives were then drafted by Wilson, and approved by the others participating in the selection, justifying the selection of each of the two RIF candidates. These were submitted to Henderson, who received a total of 18 names and narratives from the groups in Division X. Then, after consultation with the group leaders, he placed these 18 in rank order and submitted them to John Browne, the Associate Director for Defense Research Applications. The grievant was number 6 on that list. Eventually 10 employees were RIF'd from Division X, among them the grievant.

On February 4, 1987, the grievant was given formal notice by Michael Henderson that he had been selected for a Reduction-In-Force. In accordance with Laboratory policy this notice provided that he had until April 10, 1987 to locate another position with the Laboratory and that if he did not obtain such a position by March 11, 1987 he would again be given a formal notification that he would be terminated from the laboratory. Such notice was given but the grievant did obtain another Laboratory position in Group N-9 in April, at no reduction in pay, and hence was not terminated.[1] On May 11, 1987, a formal request for a grievance hearing was filed, to be supplemented with details later. The supplementary material, labeled "GRIEVANCE COMPLAINT, PART II," was submitted on July 20, 1987. It was prepared without counsel and consisted of 74 pages, with approximately 340 pages of appendices. The original May 11 grievance

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[1] It appears that, about a year later, the grievant was terminated from his N-9 position. No issue as to that termination was presented in this proceeding and no evidence was offered as to its circumstances.

requested rescission of the statements made in the RIF narrative and "reinstatement of my position at X-1 with an appropriate salary alignment." In Part II, dated July 20, the request for relief was both modified and enlarged, as follows:

> (1) I shall request to see all of my files: personnel, security, FBI, CIA, etc. which have been contributed to during this investigation. I shall, furthermore, request deletion of all untrue and all insinuative statements contained therein. I include in this request all of the RIF related memos.
>
> (2) I shall request my reinstatement to a position within the Laboratory in my field of expertise that would be equivalent to the position that I held in X-1 prior to my RIF in which I could continue my work on the microsource, and where I will be able to run codes like LASNEX to do this work with appropriate security access and where I could contribute fully to the Laboratory.
>
> (3) I shall request that my salary be aligned to a level commensurate with my qualifications, my experience, and to that of others doing a similar level of work at the Laboratory, and that this alignment be retroactive to October 1986 when I was denied the BPI due to the circumstances described in this grievance. Additionally, consideration should be given to just compensation for wages lost while taking leave without pay to work on preparation and follow through of subjects related to this grievance and for the hardship that these circumstances have inflicted upon myself and my family with respect to the normal

conduct of our lives during the period from February 4, 1987 to such time that there is a resolution of this grievance.

(4) As stated in my introduction, I should be given the opportunity for a professional exoneration of the statements made to discredit me in my field of expertise. A review of all the possible drivers for a microsource with a specific set of theoretical questions to be answered as was explained in my memo (pg. C27-C32) where each of the advocates would be given an opportunity to defend his position.

(5) Deletion of the Performance Appraisal for the period May 1, 1986 - April 30, 1987 written by the current management of X-1 and a postponement of any appraisal until after the resolution of this grievance.

(6) As indicated, a security recheck to clear any doubts, allegations, and insinuations that have been imputed against me.

(7) And, finally, I would request that appropriate changes be made within the Laboratory management such that adequate freedom exists for scientists, like myself and others, who may differ from the mainstream but who have substantial evidence for these differences, to be permitted to continue to work in an atmosphere that will permit them to make significant contributions to both the Laboratory and the field of expertise in which they are working. (Ex.1,

pp.77-78, emphasis in original.)[2]

My appointment as Hearing officer was confirmed on June 6, 1988. When the hearing opened on July 5, 1988, more than a year after the grievance was filed, the grievant was represented by counsel. The trial brief submitted by counsel stated the issues to be:

> 1. Did the termination of Dr. Mascheroni by the Los Alamos National Laboratory violate University of California Staff Personnel Policy 760.11 which requires layoff in inverse order of seniority?
>
> 2. Did Dr. Mascheroni's termination also violate the express terms of the Los Alamos Administrative Manual?
>
> 3. Is termination of a Los Alamos National Laboratory employee exempt from the grievance procedure as an exercise of the "Director's interpretation of Laboratory policies, and standards?"
>
> 4. Do United States and California public policy and law prohibit termination of employment of an employee in retaliation for

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[2] The grievance and its appendices were introduced as Exhibit 1. The pages were subsequently reordered, but citations to it will show the page in the exhibit as originally introduced.

his or her expression of opinion?

5. Must Dr. Mascheroni's termination be set aside because the facts of record establish that it was arbitrary and capricious, that the allegations of the reduction in force memorandum are not supported by substantial evidence but rather are both untrue and pretextual, that the allegations do not comply with the standards fixed for reduction in force, and that the true reasons for Dr. Mascheroni's termination are prejudice against his personality and national origin, and retaliation for his truthful expression of opinion.

The "termination" referred to was, in fact, the RIF from X-1. The relief requested in the trial brief was:

> "[T]he reduction in force memorandum should be deleted from Dr. Mascheroni's record, Dr. Mascheroni should be reinstated to his job at Los Alamos National Laboratory, and Dr. Mascheroni should be awarded the full backpay and benefits."

At the hearing counsel for the grievant accepted the burden of going forward with the evidence. The first four days, July 57, were occupied almost entirely by evidence adduced by the grievant going, among other things, to the question of the grievant's competence and accomplishments in an effort to disprove the allegations contained in the RIF narrative justifying the recommendation that the grievant be selected for the reduction in force. The first session concluded

on July 7, 1988 with the understanding that, with the exception of cross-examination of the grievant and the conclusion of the interrupted testimony of Joseph Kindel, group leader of X-1 from October, 1981 to May, 1986, the presentation of evidence in support of the grievance had been concluded (2 Tr. 48, 496).[3]

The hearings resumed on September 24, 1988. Joseph Kindel concluded his testimony and the grievant was cross-examined. The laboratory then presented its witnesses. After rebuttal testimony by the grievant the hearings were concluded.

At the close of the hearing, it was agreed that the grievant would submit an opening brief 30 days after receipt of the transcript and the laboratory would file its brief 30 days thereafter, with 10 days for a reply brief by the grievant. Extensions were agreed upon and the briefs were ultimately filed as indicated in the chronology above. The grievant's brief did not restate the issues to be decided but concluded with the following prayer for relief: 11 ... the reduction in force narrative must be set aside and Dr. Mascheroni should be reinstated as a staff member of Group X-1 at the Los Angeles National Laboratory with back pay."

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[3] The four volumes of the transcript of the first hearing session are paged consecutively beginning with page 1, as are the four volumes of the second session. Citations to the transcript will first indicate the session (1 or 2) and the page number. Citations to the grievance and its appendices will be shown as Ex. 1 with the page numbers.

The grievant's reply brief contained a motion to reopen the hearing. I responded by requesting an offer of proof as to what would be sought to be proved at such reopened hearing. When this was tendered I concluded that the proffered testimony was insufficiently pertinent to the issues involved and denied the motion. At the close of the hearing the grievant had requested that oral argument be held after the briefing had been completed. That request was denied when the motion for a reopened hearing was denied.

Issues

The "Guidelines for the conduct of the Laboratory Grievance Hearings" require that a hearing report must include "a clear identification of the issues properly before the hearing committee or officer."

Until the hearing opened on July 5, 1988 those issues were, at most, those comprised within Dr. Mascheroni's grievance and its supplement. The trial brief presented by counsel at the opening of the hearing, however, sought to add additional issues.

Issue No. 1 stated by counsel was based upon University of California Staff Personnel Policy (SPP) 760.11. SPP 760.11 provides that "The order of indefinite layoff and reduction in time of employees in the same class within a department shall be in inverse order of seniority. . . ." That claim, if sustained, would make irrelevant all of the factual testimony produced at the hearing and, indeed, would negate the entire basis upon which the parties assumed this proceeding was to be conducted.

The SPP is an integrated document governing the terms and conditions of employment and the procedures for the resolution of grievances of a group of employees of the University of California denominated as "staff employees." These are defined, in SPP 110, as employees who "provide administrative, professional, technical, clerical, or service support for the teaching and research functions of the University." The contention of the grievant that reductions in force of Staff Members of the Laboratory are governed by SPP 760.11 can be sustained only if the SPP -- all of it, including its procedural provisions, not just 760.11 -- applies to Staff Members of the Laboratory. It is plain that it does not.

It was assumed by the grievant, by the Laboratory, and by me that this proceeding was governed by the provisions of the Laboratory's Administrative Manual (AM). The SPP that contains the layoff provision relied upon in the grievant's trial brief has an entirely different procedure. Under SPP 280.24 the decision of a hearing officer alleging violations of the provisions regarding layoff and reduction in time are to be "final and binding." The letter appointing me, on the other hand, specified that the decision of the hearing officer is not final but would constitute a recommendation to the Laboratory Director who would make the final decision, as provided in Am 111.14 and the grievant did not object.

SPP 300.1 requires that staff positions be classified on the basis of duties and responsibilities. Class specifications, it states, shall "state the title, concept, examples of work, and minimum qualifications of each class." SPP 300.2 provides that the class title is the official title of each position and is used on payrolls, budget documents and other official records

and publications. SPP 310.2 provides a standard work schedule of eight hours per day on five consecutive days from 8:00 a.m. to 5:00 p.m. and SPP 315.6 provides for overtime at straight time hourly rates, on the basis of nearest one-quarter hour, for certain classes of exempt employees and overtime pay at one and one-half times the straight time hourly rate for the others. SPP 305 governs pay for staff personnel specifying the timing and conditions and amounts of merit increases by steps within classifications, the payroll effects of promotions, demotions, transfers and reclassification, etc. SPP 305.38 provides for shift differentials, and, as stated, SPP 760.11 requires that layoffs be in inverse order of seniority. The contention based on SPP 760.11 can be sustained only if all of these provisions can be deemed to apply to employees such as Dr. Mascheroni.

Employees such as Dr. Mascheroni are denominated by the Laboratory as "Staff Members." The Laboratory's Administrative Manual (AM) specifies in 202.01 that "positions at the Laboratory are divided into two employment series, the Staff Member series and the Structured Series. The Structured Series is further subdivided into three distinct series: "(l) the Technical Support (TEC) series, (2) the General Support (GEN) series, and (3) the administrative Staff Member (ASM) series." AM 202.04 The TEC series employees provide "technical support expertise ... to professional staff." AM 202.06. The GEN series employees "provide nontechnical logistical support . . . for example, secretarial, clerical, food service, transportation and materials supply." AM 202.07. Each of the Structural Series is further divided into levels reflecting the increasing degree of difficulty and responsibility associated with the work performed. These levels could be said to be somewhat comparable to the

classifications provided for in Section 300.1 of the SPP.

Staff Members, on the other hand, are defined in the AM as "practicing engineers, scientists or managers primarily engaged in professional research and development activities." There is no system of salary levels for the Staff Member series based on the work performed; instead there are guidelines based on the employee's professional degree and years of relevant professional experience since the degree. Employees in the Staff Member series are exempt and are not entitled to overtime pay except in exceptional circumstances. Shift differentials are provided for GEN and TEC employees, but not for Staff Members. AM 303.04

All of these differences indicate what would be plain in any case. The Staff Personnel Policies of the University of California are intended to apply, as they explicitly state, to supporting staff, those who support those charged with performing the institution's function. At the Laboratory the word "staff" is not used in this sense at all. It is the Staff Members who
perform the institution's function. The support for them, provided elsewhere by "staff," is provided by the GEN and TEC employees. If any group of Laboratory employees is covered by the SPP, a question on which I express no opinion, it is the GEN and TEC employees, not those in the Staff Member series.

Finally, and perhaps redundantly, the provision with respect to layoffs relied upon by the grievant's attorney, SPP 760.11, cannot sensibly be applied to Laboratory Staff Members even by analogy. It provides that layoffs in inverse order of seniority shall be "effected by department and by

class (title code)." The title code under SPP is in fact a very narrow description. (For example an airplane pilot who serves as a captain has a different title code than one who serves as a co-pilot, and, for layoff purposes, only those with the same title code are considered.) At the Laboratory, however, the only "title code" for a Staff Member is Staff Member, i.e. all of the engineers, physicists, chemists and computer scientists employed by the Laboratory without regard to function or specialty. Furthermore, SPP 760.11 requires that layoffs in a title code be in inverse seniority order in a "department". There is no such thing at the Laboratory as a "department." The ascending levels of organization are section, group, division, and directorate. Clearly neither a section nor a group could be considered to be analogous to a department. Hence application of SP 760.11 to Staff Members would require that reductions in force at the Laboratory take place by laying off the junior scientists without regard to specialty or field within an entire directorate or, at the very least, division. Any such result makes clear the inherent frivolity of the claim that the SPP applies to the scientists at the Laboratory simply because the word "staff," used in the SPP to describe support personnel, is part of the title "Staff Member," used to describe the scientists at the Laboratory.

I conclude, therefore, that this proceeding involving a "Staff Member" is governed by the Laboratory's Administrative Manual, not the University's Staff Personnel Policy, and that the claim based on SPP 760.11 is not proper.

Issue No. 2 stated by counsel for the grievant (with the amendment that there was no "termination" but, rather, a reduction in force) is clearly within my competence. Issue No. 3 was stated by counsel for the grievant to be: "Is termination

of a Los Alamos National Laboratory employee exempt from the grievance procedure as an exercise of the 'Director's interpretation of Laboratory policies, and standards?'" The Laboratory does not contend that the grievance is exempt for that reason and I conclude that it is not. That issue is therefore resolved in the grievant's favor without the necessity for further discussion.

Counsel for the grievant has also tendered, as Issue No. 4, the question of whether United States and California public policy and law prohibit termination of an employee for his or her expression of opinion. As I made clear at the hearing, whatever my view may be as to the abstract question of law posed by counsel, I do not believe it is my function to decide those questions in this proceeding. my jurisdiction is defined by the Laboratory policy pursuant to which I was appointed. AM 111 provides in relevant part:

> .05 Except as stated below, the resolution of complaints alleging improper management actions that adversely affect terms and conditions of employment may be pursued under the provisions of Laboratory administrative review or grievance policies and procedures, as appropriate.
>
> Management action that is clearly and specifically mandated by law, court order, contractual obligation, or DOE regulations or directives is not subject to either grievance or administrative review. The promulgation, content, and Director's interpretation of Laboratory policies, standards, benefits, and salary

rates or ranges are not subject to either grievance or administrative review..

.06 Complaints specifically designated for resolution under the administrative review procedure are not reviewable under the grievance procedure....

.07 The administrative review procedure is intended to be used for review and resolution of any complaint regarding a specific management action adversely affecting terms and conditions of employment, including but not limited to: Selection for transfer or promotion, Position classification, Salary actions, Content of performance evaluation, and written warnings involving a complaint that qualifies for review under the administrative review policy

.08 The grievance procedure is intended to resolve complaints alleging improper actions of serious consequences, including: Involuntary termination; Alleged discriminatory practices; corrective action involving probation, demotion, suspension without pay, temporary or indefinite within-range salary decrease, or written warnings pertaining to such actions; and other alleged improper actions of serious consequence comparable to those described above that may adversely affect the rights and privileges of employees as set forth in Laboratory policies or procedures.

The Laboratory's "Guidelines for the Conduct of the

Laboratory Grievance Hearings" specifies that the hearing officer must determine the issues, the facts, and "(3) the applicable personnel policies listed in the grievance and which have been violated, (if any); and (4) in corrective action or dismissal grievances, whether the action was reasonable under the circumstances. If no covered personnel policy is identified as allegedly violated, the complaint does not constitute a grievance. . . . " It follows that I can consider "United States and California public policy and law" to the extent, but only to the extent, that they are expressedly or impliedly incorporated into the Laboratory's personnel policy. If, for example, or. Mascheroni's RIF was motivated by discrimination because of national origin it might constitute a violation of law but would be cognizable in the grievance procedure only as a violation of the express terms of AM 101.01.

Issue No. 5, as stated by counsel, includes a variety of contentions that do not explicitly relate to applicable personnel policies. I am limited by the Laboratory's guidelines to claims of violation of the policies. The contentions made, however, can be rephrased to come within those policies.

The governing personnel policy is AM 114.02. It provides that "Selections for reduction-in-force are based on legitimate Laboratory requirements and are in accordance with the Laboratory's non-discrimination policy. See AM 101.01." The claim that the reason for grievant's RIF was prejudice against his national origin is therefore clearly an issue properly before me. The other claims contained in Issue No. 5 stated by counsel for the grievant must be measured against the standard that the reduction in force of the grievant must be based on "legitimate Laboratory requirements."

Some suggestion was made early in the hearings that there was in fact no reduction in force at all and that the purported RIF of the grievant was a subterfuge for what was essentially a discharge. This suggestion was not supported by the record and was abandoned. There is no contention that the reduction in force that did occur was not a legitimate Laboratory requirement. There is no contention that the allocation of RIF's among the divisions was not legitimate. Nor, finally, is there any contention that the criteria for selecting the employees to be RIF'd set out in DOD Jackson's memorandum were improper. The essential issue, then, is whether the choice of Dr. Mascheroni rather than some other employee in Division X was contrary, for the reasons alleged, to the criteria set forth in the Jackson memorandum.

Dr. Mascheroni's grievance as supplemented tendered a host of issues. Although the original grievance requested reinstatement in Group X-1, the supplement essentially abandoned this request and substituted a request for reinstatement "to a position within the Laboratory in my field of expertise that would be equivalent to the position that I held in X-1 prior to my RIF in which I could continue my work on the microsource..." Counsel for the grievant has, in his brief, reinstated the claim for reinstatement and it is an issue properly before me.

The grievance also requests that his salary be aligned to a level commensurate with his qualifications, that he be given the opportunity for a professional exoneration of the statements made to discredit him in his field of expertise, that the performance appraisal for the 1986-1987 period be deleted, that a security recheck be made and, finally, that changes be made within the Laboratory management. Insofar

as these requests are cognizable under the Laboratory's procedures at all they are not subject to the grievance procedure, as opposed to the administrative review procedure, and hence pose no issues cognizable in this proceeding. Salary actions and the content of performance evaluations are specifically excluded from the grievance procedure by virtue of AM 111.07. AM 111.08 does, however, bring within the grievance procedure "other alleged improper actions of serious consequence comparable to those described above [i.e. involuntary termination, discrimination, demotion, suspension without pay or salary decrease] that may adversely affect the rights and privileges of employees as set forth in Laboratory policies or procedures." Construing this broadly, it is my view that insofar as the grievance complains that the statements contained in the RIF narrative submitted by group leader Wilson are false and should be deleted it states a claim that can be considered within this procedure.

I reject the contention of the grievant that an issue to be resolved in this proceeding is whether it is "true scientifically that hydrogen fluoride (HF) was the driver of choice for a laser to trigger inertial confinement fusion (as asserted by Dr. Mascheroni) whereas the Laboratory elected to pursue krypton fluoride (KrF) as the driver." The grievant's contention is set forth in the reply brief, dated August 15, 1989, as follows:

> The Hearing Officer brought to the hearing the rule generally applied in labor law that management - right or wrong - has the right to manage the business. Thus, if General Motors elects to put fin tails on its Cadillac, the member of the United Automobile

> Workers union has no valid complaint even though the design is ugly, tasteless and dysfunctional ....

For those reasons the Hearing Officer stated that he would not set aside the elimination of Dr Mascheroni even if it turned out to be true scientifically that hydrogen fluoride (HF) was the driver of choice for a laser to trigger inertial confinement fusion (as asserted by Dr Mascheroni) whereas the Laboratory elected to pursue krypton fluoride (KrF) as the driver.

But the rule proposed by the Hearing Officer is wrong as applied to a scientific laboratory.

The quoted statement does correctly describe what I believe is the appropriate approach to this matter: That the management of the Laboratory has the right to manage the Laboratory. It does not have the right to prescribe the results of the scientific research conducted by its employees but it has the right to decide what research it requires be performed. Accordingly I will not attempt to resolve the issue tendered by Mr. Mascheroni: that the Laboratory's research into KrF as the driver for inertial confinement fusion is misdirected and that it should, instead, direct its energies to the utilization of HF. it follows that the grievance must be denied at the outset insofar as it requests that he be reinstated in order to continue work on his chosen field of research rather than that directed by management.

This does not necessarily mean that Dr. Mascheroni's grievance should be denied in its entirety. One thrust of Dr. Mascheroni's grievance was that his proof that HF was the preferred driver for inertial confinement fusion because KrF

was bound to fail jeopardized the positions of Dr. Wilson, the group leader of X-1, and his deputy, Dr. Mead, and that they conspired to eliminate him from X-1 in order to preserve their jobs. They did so by going through the forms of an analysis based on the Jackson RIF criteria, it is claimed, with the pre-determined conclusion to recommend that the grievant be RIF'd and then ensured this result by concocting a false and fraudulent narrative to support their recommendation. If the criteria established by the Laboratory to determine which of its employees would be RIF'd, properly applied, would have led to the elimination of someone other than Dr. Mascheroni but they were distorted in order to protect the positions of Wilson and Mead it could be found that there was a violation of Laboratory policy, although the nature of the relief to be granted might still be in doubt. If, on the other hand, it is true, as contended by the Laboratory, that Dr. Mascheroni's insistence on working only, or primarily, on subjects which the Laboratory had determined were not the desired subjects for research, then the determination that if someone had to be let go Mascheroni was a proper candidate for a reduction in force would be sustained.

The final potential issue in this proceeding relates to back pay. The grievance as originally filed and as supplemented did not request back pay. Indeed, such a claim would have been improper since at the time the grievance was filed Dr. Mascheroni was employed by the Laboratory in Division N at the same rate of pay he had received while employed in Division X. There was no hiatus between his employment in Division X and his employment in Division N and he apparently did not then apply for or receive the severance pay payable, under the provisions of AM 114.05, to laboratory employees "who are terminated because of a

reduction in force." As earlier stated, it appears that Dr. Mascheroni was subsequently terminated from his position in Division N but there is no claim in this proceeding relating to that termination. Although counsel for the grievant included in his request for relief both reinstatement in Group X-1 and back pay there can be, therefore, no question of back pay even if I should conclude that the grievance should be sustained and that the grievant should therefore be reinstated in Group X-1.

Evidence Received and Positions of the Parties

The Laboratory's guidelines require' as the second element of a report and recommendation, that there be a brief summary of the evidence and testimony received, including the positions of the parties. I have already listed the witnesses who testified. Much of the testimony adduced by the grievant related to the merits of Dr. Mascheroni's scientific views, matters on which I am not competent and which I believe not to be relevant to the issues properly before me. Any attempt to summarize that evidence would necessarily involve a substantial risk of error. The entire hearing was transcribed and the full transcript is available to those who will review this report and recommendation. Rather than summarize the relevant evidence I will set forth below the facts as I have found them based on the evidence received. To the extent that those findings refer to scientific matters there may be some inaccuracies in the use of technical terms but they do not, I believe, affect the conclusions reached.

The positions of the parties have already been summarized and will be dealt with further after my findings of fact.

The Facts

Employment History. Extensive testimony was taken at the hearing concerning Dr. Mascheroni's employment history at the Laboratory. Roughly the first two years of that employment were uneventful. He was assigned to the target design section of Group X-1 under the supervision of Erik Lindman. His assignment was to design Helios Polaris targets. In order to do this he had to become familiar with the LASNEX code. Lindman reported in July 1, 1981 that Dr. Mascheroni had moved quickly to understand and use LASNEX as a design tool and had performed satisfactorily in developing reactor targets.

In October of 1981 Joseph Kindel became group leader of Group X. Lindman went from the target design section to the plasma physics section and Douglas Wilson became head of the target design section. For a brief period of time Dr. Mascheroni remained in the target design section but he objected to working under Wilson. He was then transferred by Kindel to the plasma physics section and continued to work under Lindman's supervision. Shortly thereafter Lindman left the Laboratory and Ken Lee succeeded him as section leader in the plasma physics section.

It was at this point, in 1982, that Dr. Mascheroni's first scientific controversies with Laboratory management began. I have already said that I do not have the authority (or the competence) to decide who is right in the scientific controversies between Dr. Mascheroni and his superiors at the Laboratory. A brief, and perhaps imprecise description of those controversies is, however, necessary if Dr. Mascheroni's employment history is to be adequately set out.

During the first two years of his employment Dr. Mascheroni had not only become familiar with LASNEX but had come to the conclusion that changes had to be made in the LASNEX code to more accurately describe the laser-target interaction. It involved what Dr. Mascheroni termed "Code Validation Physics." In order to make LASNEX predictions conform to experimental results, some, scientists introduced ad hoc parameters (flux limiters) into the calculations. Dr. Mead was one of the principal developers of this concept before he came to Los Alamos (1 Tr. 190). Dr. Mascheroni referred to them as "fudge factors". He insisted that they were impermissible if a method of including the basic physics into LASNEX were possible. He proposed to do this by incorporating into LASNEX extrapolations from the WAVE code developed by Dr. Forslund. WAVE simulates interactions over a small fraction of a picosecond, while LASNEX covers target performance over nanoseconds, a thousand times longer. This work required a very large amount of computer time and there was disagreement as to whether the expenditure was worth it; it deprived others of computer time to make other calculations and many believe that the use of ad hoc factors provided sufficient exactitude for all practical purposes, at least within a certain range. Furthermore, Dr. Forslund, the formulator and premier expert on the WAVE Code, was not certain that the assumptions necessary to use it as Dr. Mascheroni did were necessarily correct. There were, therefore, heated controversies with other members of the group, such as R. Gary Lee. Ken Lee, Dr. Mascheroni's new section leader, directed him to engage in some other work, classified and therefore not specified in the record. Dr. Mascheroni refused and he appealed to Joseph Kindel, the X-1 group leader. When he got no satisfaction from Kindel he asked Kindel's permission to take his

disagreement to X division leadership[4].

In December, 1982, Ken Lee sent a memorandum to Dr. Mascheroni, through Kindel, complaining that he had refused to submit a written report on his work on LASNEX and directing him to do so. The memorandum, in part, said:

> On December 6, 1982, 1 talked to you about the importance of your input. Since you spend more time than anyone in the group working on improving LASNEX (which you have worked an for nearly two years), I explained to you that your input is valuable and that the rest of the group should have the benefit of your experience. You basically said to me that the input I desired will not be provided and you are of the opinion that an Associate Group Leader should be technically knowledgeable about the problem areas

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[4] Dr. Mascheroni's performance assessment for the period from July 1981 through June 30, 1982 was never signed by Dr. Mascheroni. As originally drafted by Kindel it said that is research had not been documented in written form but that although his work was of generally high quality a difficulty was simply that his drive and high view of his own efforts tended to limit his effectiveness. This assessment was redrafted several times. Indeed Dr. Mascheroni undertook to draft and submit a proposed evaluation for Kindel to adopt. Kindel refused to adopt it and finally submitted a revised evaluation in December 1982. Although the criticisms were somewhat modified they were still not satisfactory to Dr. Mascheroni and he refused to sign it. The documents relating to this episode are contained in Exhibits 17 and 18.

and necessary improvements in LASNEX without any input from you.

This position is unacceptable. It does not enable your work in this area to be integrated with the rest of X-1, given its priorities. You already are utilizing a sizeable amount of support provided by X-7 on LASNEX as well as sizeable amounts of computer time. (Exhibit 17.)

The controversy was referred to the deputy division leader, Thomas Hirons and was resolved in a memorandum signed by Dr. Mascheroni in May of 1983. (Exhibit 5.) This memorandum described Dr. Mascheroni's job assignment as being to "prepare reports and/or papers for publication" dealing with his work with LASNEX and WAVE and to develop a theoretical formulation of the basic mechanisms for the production of hot/fast electrons. He was to report directly to Kindel and Hirons and not to work under any section leader. The memorandum concluded with the following statement: "Since you have indicated that you do not wish to stay in X-1, I will discuss with you the possibilities for other positions in the Division. If a suitable position can be found with another group, an internal transfer will be arranged. If such an arrangement cannot be effected, and you still feel that you cannot work under the direction of the X-1 Group Management, you will be given some reasonable amount of time, i.e., two to three months, to look for another position in the Laboratory."

At the hearing, Dr. Mascheroni explained that the wish not to stay in X-1, referred to in the Hiron's memorandum, was a wish not to stay in X-1, "unless certain

things were changed." Specifically, the "change was to let me continue with this work." (1 Tr. 925)

Hirons evaluated Dr. Mascheroni's performance in February 1984. Since he did not feel that he had sufficient expertise to evaluate the quality of Dr. Mascheroni's work he included in his assessment evaluations from several persons with different areas of expertise. He concluded that Dr. Mascheroni's approach to calculating the laser-target interaction problem was technically sound and that his work was a useful contribution to the ICF theory effort. However, he concluded that such an approach was computationally very expensive and might not be worth the cost unless it could be applied to a wide range of laser driven ICF targets . He concluded by stating that a question remained as to whether the required magnitude of Dr. Mascheroni's effort was justified within the context of the ICF program in X-1. His recommendation was that Dr. Mascheroni should sit down with the X1 Group Leader and work out a job assignment mutually acceptable to both parties. (Ex. 1, p. 89.)

Dr. Mascheroni made extensive comment upon this evaluation. He responded to the criticisms summarized in the assessments made by those who Dr. Hirons had quoted and concluded that "to my knowledge, the X-1 management does not have an outline of X-11s mission oriented program . . . which would define the theoretical responsibility of the group with respect to the ICF program and, thus, to the Lab." (Ex. 1, p. 81.)

In the succeeding period Dr. Mascheroni was first assigned to work under Dr. William Mead as his section leader. This did not prove to be satisfactory. One of the

assignments was to continue work on what Dr. Mascheroni called "Code Validation Physics." The other was to select an area, in conjunction with his supervisor (Mead) which would lead to a new, specific and publishable piece of work, in such areas as analyzing a short wave length experiment using LASNEX or improving a reactor design target. It was specified that these areas were illustrative, not exhaustive, and that one area needs to be agreed upon. (Ex. 1, p. 84.) Mead testified that agreement was reached on the short wavelength topic but Dr. Mascheroni did not work on it. (2 Tr. 816.) As Dr. Mascheroni explained it, he did do the work, but he had a philosophical disagreement with Mead about the use of ad hoc parameters. (2 Tr. 969). When Mead complained to group leader Kindel he was told that Mascheroni had chosen a CO, project and that he would no longer be considered to be in Mead's section.

Under the arrangement that Dr. Mascheroni worked out with Kindel he, unlike others in the group, did not report to a section leader but worked under the direct supervision of Kindel. Kindel's evaluation of Dr. Mascheroni's performance during this period were quite positive, although he continued to rate Dr. Mascheroni lower than most others in group X-1.

One significant result of Dr. Mascheroni's calculations led to a further controversy. When he first came to the Laboratory his worked involved target design for Helios, a small carbon dioxide (CO_2) laser. Helios was succeeded by Antares, a much larger C02 laser. Neither succeeded in producing usable inertial confinement fusion. The difficulty is in the transfer of energy from the laser to the target. One of the principal sources of inefficiency in that transfer is that hot and super hot electrons are emitted which prevent sufficient

energy from being transmitted to the target to cause the desired implosion. Dr. Mascheroni came to the conclusion that the emission of hot and superhot electrons would be reduced if a longer pulse time were used. This was not possible with the Helios laser, which had a one nanosecond laser, but would have been possible with its successor, Antares. However there was disagreement by others, including Forslund and Kindel, with Dr. Mascheroni's thesis as to the utility of a long pulse regime to deal with the hot electron problem. In any event, the initial experiments with Antares were conducted in a short pulse regime and the hot electron problem was not resolved. Sometime in 1983 or 1984 it was made clear to the Laboratory that the Department of Energy would not continue to fund experiments with Antares but would fund a different laser in the continuing ICF effort.

It seems clear that the coupling efficiency between laser and target is related to the wave length radiated by the laser; the longer the wave length the lower the efficiency. C02 has a wave length of 10 microns. Krypton fluoride (KrF) has a wave length of .25 microns. The decision was therefore made to abandon and dismantle Antares and build Aurora, a KrF laser, using some of the Antares components. The official shut down of Antares took place in October, 1985. Meanwhile, Dr. Mead, who had been employed at the Lawrence Livermore Laboratory, was offered a position in group X-1 at Los Alamos to do theoretical work on the KrF project.

Before Antares was fully dismantled, however, an experiment had been conducted with Antares in June, 1985, by Marvin Mueller and Charles Mansfield in the long pulse regime that had been earlier advocated by Dr. Mascheroni. As

Dr. Mascheroni had predicted, and contrary to the view of Forslund and Kindel, fewer hot electrons were thrown off. The experiment was not completely successful, however, because Antares was in a state of partial disrepair. The hot electron temperature went down when the power stayed constant or decayed, but there were two regions where the power rose fast and produced super-hot electrons (Ex. 1, p. 25). In January 1986, Mansfield proposed to restart Antares and conduct further experiments at an 80 KJ level in the long pulse regime. This required rehabilitation and necessary improvements in the system. The refurbishment and improvement cost was estimated at about two million dollars and the cost of operating the experiments after that was done, was estimated at $400,000 a month (Ex. 1, pp. 254-264). According to a later memo from Mascheroni, Mansfield and Mueller about four and a half months of operation would be required (Ex. 1, pp. 273-274). (This total cost, of about 2.5 to 3 million dollars compares with the cost, stated in a memo by Mansfield, Mueller and Mascheroni, of 80 million dollars for the construction of Antares.)

The entire subject was canvassed on March 10, 1986, at a meeting in the Green Room of a group of leading scientists at the Laboratory involved in the ICF effort. Mascheroni, Mueller and Mansfield made presentations concerning the improved performance of Antares in the long pulse regime and urged that Antares be restarted. dn March 24, 1986, however, the decision was made not to restart Antares. According to the memorandum from Browne and Rockwood announcing the decision, a majority of the scientific personnel at the March 10 meeting were of the view that, although an improved parameter range had been discovered, the diversion of resources from the Aurora KrF

program to Antares was not justified (Ex. 1, pp. 285-286).

According to Dr. Mascheroni's brief -- I find no reference to this contention in the documents -- his presentation to the March 10 meeting also reported that experiments demonstrated that fusion would not take place in existing targets at laser energies less than 100 megajoules and that a 100 megajoule KrF laser would cost 20 billion dollars. This it is said, demonstrated the impossibility at acceptable cost levels of achieving inertial confinement fusion with the KrF program and "constituted a grievous blow to Wilson, Mead, Henderson and Cartright who had placed all of their eggs in the KrF laser basket." Neither Reed Jensen nor Charles Mansfield, who testified on the subject, recalled any discussion at the meeting as to the impossibility at acceptable cost levels of achieving ICF with a KrF laser.

It does seem clear, however, that there was some discussion at the March 10, 1986 meeting concerning the energy necessary to create fusion and the cost per joule of the KrF laser. Shortly thereafter conversations took place between Dr. Mascheroni and Reed Jensen, who was then the program manager for KrF lasers and who had done work with hydrogen fluoride (HF) lasers. Jensen said that an HF laser would only cost 30 cents per joule, many hundreds of times less than a KrF laser. Dr. Mascheroni had a meeting with Jensen and Jensen produced a memorandum suggesting that the research on KrF be merged with a renewed interest in HF lasers since -- as his memorandum was entitled -- "HALF MEGAJOULE UNDER OUR NOSES AND 100 MAGAJOULES ON OUR DOORSTEP." (Ex.1, pp. 276281). At the base of that renewed interest, the memorandum stated, was a point of view about the ability to

stretch HF pulses over a l0 nanosecond duration. Attached to the memorandum were technical notes which included the comment that "proving efficient operation at pulse lengths greater than 1 nanosecond is a formidable technical task and should be started immediately."

Jensen did not pursue the matter further. Dr. Mascheroni did. He first went to Damon Giovanielli, saying that the KrF laser would never work but that HF should be pursued. Dr. Mascheroni was a theoretical physicist, not a laser builder but he was able to persuade Claude Phipps, who had technical competence in this field, to join with him in designing an HF laser.

All of this occurred during the period when Kindel was or. Mascheroni's immediate supervisor. Kindel was informed of Dr. Mascheroni's activities and approved them. In May of 1986, however, Kindel resigned. Dr. Mascheroni submitted an application for the position of group leader of X-1. (Ex.1, pp288-290). The newly appointed group leader, however, was Douglas Wilson. He, in turn, appointed William Mead as deputy group leader and Charles Wingate as target design section leader. The appointment of Wilson on July 1, 1986 was described in Dr. Mascheroni's brief in this proceeding in the following words: "On July 1, 1986 Dr. Mascheroni was delivered into the hands of his opponents."

Before Kindel's departure from group X-1 he had drafted a performance appraisal for the period prior to his departure and a job assignment for the 1986-1987 review period. The performance appraisal covering the period from June 1, 1985 to March 31, 1986 included the following language: "His efforts do not involve much of X-1 and yet, in

my view, what he is doing is of considerable importance to the ICF Program. His vision of having a Laboratory Micro-thermonuclear Source should be important to Los Alamos." (Ex.1, p. 113).

As drafted the Kindel assignment included an assignment, as described by Dr. Mascheroni in his testimony, that he "should work in HF and collaborate with Jensen developing a driver for inertial fusion." Wilson drafted a new assignment that deleted the direction to work in HF in collaboration with Jensen. Kindel's draft had assigned Dr. Mascheroni to become "increasingly involved in VL&C modeling of experiments with Kopp and Gitomer-11 Wilson's draft added to this a direction to "incorporate into LASNEX low temperature materials properties models (e.g., non-LTE opacity) under development in T-division." (Ex. 1, p. 110).

In a meeting with Wilson on or about July 29 to discuss this draft Wilson said that he had checked with Jensen and that Jensen had reported that there was a difficulty with respect to the time shape of the pulse, and that work on HF would therefore not be within Mascheroni's assignment (2 Tr. 563). Mascheroni made no comment on the deletion but objected to the addition which Wilson had made dealing with incorporation into LASNEX of low temperature materials properties models. He said that this was technically impossible and that LASNEX code would not run with those materials. The assignment, he said, would have to be rewritten in more general terms.

In August the assignment still was not finalized because of this disagreement as to the incorporation of low-temperature materials into LASNEX. Wilson went on

vacation. Despite the fact that he had been informed that HF was not to be part of his job assignment, Mascheroni persisted. He drafted a detailed proposal for building an HF microsource. He went to Mike Henderson, the X division leader, and complained about the deletion of HF. Henderson told him to accept the assignment he had been given. (1 Tr. 44). He talked to John Norton, the team leader for LASNEX. He submitted on September 2, 1986, a detailed proposal for a 100 megajoule HF laser. Norton suggested that he see Steve Rockwood, then ADDRA. He did so. Rockwood told him to see Birely, the Deputy Director for Defense Applications, who suggested that he give broad distribution to his proposal. On October 7 he made a presentation to a seminar in the chemistry division. On October 15 he submitted a proposal for financial support during fiscal year 1987 for the building of the proposed HF laser. He pressed it at a meeting of the American Physical Society in November of 1986. He went to John C. Browne, the new ADDRA, urging the adoption of his proposal and submitted several memoranda to him urging the superiority of HF over KrF and complaining about derogatory remarks that had been made by David Cartright, the program director for ICF and others about his work. At about the same time, in December 1986, he presented an unclassified version of his proposal to a conference at the Sandia National Laboratory in Albuquerque.

Most of this activity took place after September 25, 1986, when the job assignment for the period commencing March 31, 1986 was finally settled and signed by Wilson and Mascheroni. The assignment with respect to the LASNEX code at low temperatures and solid densities was rewritten to meet Dr. Mascheroni's objections. The assignment to work on HF remained deleted. The following, however, was added

with respect to it:

> "Leo is interested in exploring the potential of chemical lasers for a large laboratory facility capable of producing DT burn. We have no programmatic request to pursue this, nor do I support it. I believe that working on this will only serve to enhance Leo's reputation for doing irrelevant research. I believe his interests and the Laboratory's will be better served by making a substantial contribution to laser VL&C."

Wilson testified that he attempted to discuss that addition with Dr. Mascheroni but that Dr. Mascheroni did not wish to do so (2 Tr. 570). Instead he responded in the place reserved on the appraisal form for employee comments. That response, in part, said:

> "Pertaining to my reputation. The comment made here must be supported by either technical fact or is based on personal prejudice. This type of comment from Wilson is not new to me since he volunteered this opinion of me to others while he was in the program office. If the guidelines for pursuit of technical excellence set forth by the Director are to be adhered to, then this issue must be resolved.
>
> This is not a case where personal collegiality is the issue -- the issue here is the very basic question of technical competence.
>
> "It is regrettable that Joe Kindel resigned. His technical knowledge made him a valuable manager and a difficult one to successfully replace." (Ex. 1, pp.

115-116).

Dr. Mascheroni's appeals to higher management with respect to HF, most of which took place after it had been removed from his job assignment, ultimately brought fruit. On December 9, 1986, Damon Giovanielli, at the direction of Browne, appointed a six man panel (to which another member was later added by Browne), chaired by Greg Canavan, who had been Director of the Office of Inertia Fusion, to conduct a technical review and make recommendations with respect to the Mascheroni-Phipps HF proposal. On December 16 Phipps and Mascheroni made a presentation to that panel.

The RIF. As early as October of 1986, Michael Henderson, leader of Division X, became aware that the funds allocated for the nuclear weapons program, which included ICF as a subset, were reduced for the 1987 fiscal year. His original estimate, based on the funds allocated, was that this would require a reduction of 30 persons from X Division. It was eventually decided that the reduction in funding would be applied on a broader basis and Henderson was told that X-Division would have to reduce its personnel complement by approximately 15. Nothing was to be done, however, until he received official guidance from the office of the Deputy Director for Operations, James F. Jackson (1 Tr. pp. 419-i2l).

On January 20, 1987, Jackson distributed what was termed "PRELIMINARY GUIDANCE FOR PROPOSED REDUCTION-IN-FORCE". Although labeled preliminary it was in fact the final guidance as to the principles to be applied in accomplishing the reduction in force.

The Jackson memorandum (Ex. 2) gave instructions

as to how the reduction was to be effected. The basic organizational unit for the RIF was to be the division. The analysis of individuals within the division was to be done by the supervisors most familiar with the characteristics of the employees, with review and approval by group and division or program management. They were instructed that "You need to retain the most valuable and versatile people, those who contribute the most to the program effort that will remain after the reduction." The criteria to be used in selecting the candidates for the reduction in force were listed. Those criteria were:

> Skills, knowledge and abilities needed by the Division to meet future programmatic objects. This includes degree/field, discipline applicable to needs;
> significant program impact if the employee should terminate;
> relative transferability of skills including versatility for current and future operations within the organization;
> demonstrated, documented job performance;
> seniority, experience achievement.

The weights to be given these criteria were not required to be uniform. The instructions said that "the differences between the missions of organizational units may dictate that different weights for the set of criteria will be necessary. However, the weights within the organizational unit must be evenly applied."

Upon receiving this memorandum Henderson, as division leader, had to distribute the potential 15 person shortfall within the eight groups within the division. He initially told Wilson, the group leader of X-1, that three

persons from that group should be considered for reduction in force (1 Tr. 422). This was later reduced to two.

Upon receiving these instructions Wilson convened a meeting of the X1 management: William Mead, the deputy group leader, and Charles Wingate, Brian McVey and R. Gary Lee. They first restated the Jackson criteria as follows: 1) versatility and transferability, 2) job performance and achievement, 3) significant program impact, 4) skills, knowledge and ability, and 5) field and discipline. The first three, they decided, would initially be given a high value, while skills, knowledge and ability would be given a moderate weight, and field and discipline would initially be given no weight. These determinations, as well as each succeeding step in the process, were written on view graphs initialed by all five that were introduced as Exhibit 3 at the hearing.

The next step, called the first pass, was not to make comparative ratings but to give each employee within the group a satisfactory or unsatisfactory rating on each of the three criteria which they had determined were to be given the greatest weight. Any employee given an unsatisfactory rating on any one of these criteria was then included in the second pass. There were six such employees, including Dr. Mascheroni, who alone was rated as being unsatisfactory on all three criteria.

The second pass consisted of a comparative rating of all six with respect to the three factors previously used and, in addition, the fourth criterion -- skills, knowledge and experience. In making the comparative judgments reliance was placed on the job evaluations of each of the six. Anyone who received a rating of 5 or 6, i.e., the second to worst or

worst in this comparative rating, was then forwarded to the third pass. Three staff members "B", "D" and Mascheroni, in descending order, were considered in the third pass. In it the three were considered on an overall basis with the addition of the factor of field and discipline. This changed the relative ranking of the three: "D" was ranked higher than "B", but Dr. Mascheroni remained at the bottom (2 Tr. 809).

The result, in the end, was that these three staff members with the lowest ranking would be at the top of the list of possible personnel to be RIF'd. Dr. Mascheroni had been given the lowest ranking in the second and third passes and, hence, headed the list. The staff member described in the hearing as only "B" was next and "D" was third.

Jackson's instructions included a directive that a brief narrative should be composed for each RIF candidate reflecting the reasons why that person was put on the list and what criteria were used in the particular selection. Although he had been initially instructed to submit three candidates, Wilson persuaded division leader Henderson that only two candidates should be submitted. Wilson then proceeded to draft narratives for Dr. Mascheroni and candidate B. The draft narratives were circulated to the other members of the group that had participated in the process. After they submitted corrections the corrections were incorporated into the narratives, they were initialed by all five and were submitted to Henderson. Dr. Mascheroni's RIF narrative played a central position in the hearing. It, and my findings with respect to it, will be dealt with separately below.

When each of the seven groups within X Division submitted the names of their candidates for reduction in force,

along with the required narratives, it became Henderson's job, as division leader, to compile a single list for the division, naming in descending order the preferred candidates for the reduction. In so doing he did not rely solely on the narratives initially submitted. He met with Wilson and the other group leaders (1 Tr. 424). He asked Wilson to submit a supplemental narrative with respect to Mascheroni. Based on the narratives and his personal knowledge of those names he then compiled a single list of RIF candidates. Dr. Mascheroni was placed sixth on that list (I Tr. 430). The number actually to be RIF'd, however, depended upon the number that was eventually decided would have to go.

The list submitted by Henderson to J.C. Browne, ADDRA, contained 18 names. Henderson then negotiated with Browne and it was agreed that sufficient funds might be found to support all but 12 of those on the list. After further discussion the number was reduced to 10, all of whom were RIF'd from Division X. Dr. Mascheroni, being number 6 on that list, was informed by Henderson of his RIF on February 2, 1987. At that time the Canavan committee had not yet issued its report and in his conference with Henderson Dr. Mascheroni said "what about the HF proposal"? Henderson responded that the reduction in force had nothing to do with the HF proposal and that it was irrelevant (1 Tr. 468).

The Canavan Report. Dr. Canavan was the assistant leader of the entire physics division at Los Alamos, and had been involved in the inertial fusion program since at least 1979. The Canavan committee, or as Dr. Canavan prefers it be called, the HF committee, was appointed to do a technical review of the laser fusion scheme proposed by Mascheroni and Phipps. The proposal was to build an enormous hundred

megajoule laser. As Dr. Canavan described the function of the committee at the hearing it was not whether they would agree to build such a laser. The question put to the committee, as Dr. Canavan testified, was "is there physics there that ought to be done?" The answer was "yes." (1 Tr. 875). As Dr. Canavan made clear in his testimony the committee was not charged with the question of whether it was an appropriate allocation of laboratory funds to build an HF laser. What the committee was asked to do was to "find out if there was something there to worry about or think about or not" (1 Tr. 892).

The committee's report indicated that its study had found no "show stoppers" but that a great many questions had to be resolved before a definitive answer could be made as to the workability of an HF laser of the kind proposed. The committee agreed that the high electrical efficiency of the HF laser could make its costs an order of magnitude less than that of short wavelength lasers (such as KrF) and that it might be able to drive targets efficiently at that scale and would be simpler to build. On the other hand, the down side was that "we have neither the target nor laser designs needed for a full evaluation or, for that matter, much of the data needed to produce it." (Ex. 1, p. 193). The conclusion therefore was that it might be desirable to build a 10 kilojoule module in order to make a determination as to whether a 100 megajoule HF laser of the kind proposed should be built (Ex. 1, p. 206).

On March 9, 1987, John Browne responded in writing with a memorandum expressing his thanks for the review and stating that it defined "the relevant issues for HF and identifies a possible course of action for the Laboratory." Canavan and the members of the committee were assured that the

Laboratory would consider the findings of the report along with current ICF program priorities "to determine the most appropriate course for the Laboratory given the financial constraints at this time." (Ex. 1, p. 219).

As of the date of the hearing in this matter the decision of the Laboratory was that no HF laser should be built.

The RIF narrative. The Mascheroni RIF narrative (Ex. 1, pp. 127-128) composed by Wilson with the other members of X-1 management was devastating. It first described the values that the authors had assigned to the various criteria. on the criterion of versatility and transferability it concluded that "Leo is inflexible and has little probability of successfully transferring to other work. He will only work on problems that he is interested in. He refuses to work on assigned tasks. He is unable to collaborate on group projects with others in his field of expertise. He has been unable to collaborate with anyone else in X-1 although several attempts have been made."

On the criterion of programmatic impact of termination the memorandum said that there would be no adverse impact. It went on: "He has been assigned to work on documenting his CO_2 work and working on Laser Lethality. Rather than work on these as agreed upon, he has chosen to pursue the HF laser as a laboratory microfusion source. This work is not currently funded either by the ICF program or by ISRD.... Should the HF concept receive funding in the future we have better qualified people to assign to the task."

On the criterion of job performance and achievement

the narrative said "He is consistently a far-below average performer.... [H]e has been consistently ranked low in the performance ranking of group members used at salary review times. He has not published in refereed journals or in laboratory reports that describe the methods he used to reach conclusions.... Nonetheless, on occasions where some informal report was produced, the material was seriously flawed in both concept and detail."

On the criterion of skills, knowledge and experience the narrative said " ... The work of his that has been evaluated in detail has often shown gross conceptual and technical errors demonstrating an inadequate knowledge of the proper use of computational tools. Since he joined the Laboratory in 1979 we would expect better knowledge of our codes. His weak interpersonal skills lead to poor teamwork and very slow learning. His poor communication skills lead to misunderstanding and lack of comprehension of his work."

One of the major thrusts of the grievant's case was directed at proving the falsity of this memorandum. On the basis of all the testimony presented I conclude that the overall pejorative judgment as to Dr. Mascheroni's abilities expressed in the narrative is at best overstated and, at worst, simply false, even though in some respects the narrative is accurate.

I will address first the concededly erroneous statements in the narrative. It said that he was assigned to work on documenting his $C0_2$ work but, rather than doing that he had chosen to pursue the HF laser. In fact he had already completed the assigned task of documenting his $C0_2$ work before his assignment to do so was finalized in September, 1986. He also did some work, although

apparently very little, on the assignment to work on Laser Lethality. He did not report that work and clearly did not, as he was assigned to, become seriously "involved in VL&C modeling of experiments with Kopp and Gitomer.11 On the other hand it must be remembered that the assignment was for the period ending in mid 1987 and was not finalized until September 1986, while the narrative was composed in January 1987, and neither Wilson nor Mead checked with Dr. Mascheroni as to the work he had performed.

Similarly, the statement that "he is unable to collaborate on group projects with others in his field of expertise" was refuted by the scientists with whom he had, in fact, collaborated, such as Norton, Kephart, Phipps, Mueller, Mansfield and others. On the other hand, it is true that he did not collaborate fn any substantial way with anyone else in X-1. Joseph Kindel, under whom Dr. Mascheroni worked directly from 1984 until Kindel resigned from the Laboratory, and who was the most sympathetic of Mascheroni's super-visors, said, in his final evaluation, that Dr. Mascheroni's "efforts do not involve much of X-1."

Probably the most devastating comments in the narrative were those with respect to skills, knowledge and experience. It was charged that his work had "shown gross conceptual and technical errors demonstrating an inadequate knowledge of the proper use of computational tools . . . [w]e would expect better knowledge of our codes." The overwhelming testimony of the scientists who testified painted a picture substantially in contradiction to these statements. Dr. Norton, who was LASNEX team leader from March 1985 through July 1987, flatly denied that Dr. Mascheroni had inadequate knowledge of the LASNEX code, but

described him as "very competent at running LASNEX.11 (1 Tr. 730). In a letter to J.C. Browne written after Mascheroni had been notified of his RIF, Norton said "he knows a great deal about the LASNEX code and has rarely brought up difficulties with the code that were not true problems." (Ex. 1, pp. 119 and 132). Dr. Cranfill, a Staff Member in X-7 assigned to maintain and develop the LASNEX team who had worked with Dr. Mascheroni testified that "he was a quite competent user, very, a very discriminating user, and, in fact, got to the point where he was actually developing the code as well as using it." (1 Tr. 837). Kindel, in his appraisal of Dr. Mascheroni's work in the 1984-85 period, stated that "With respect to his support of the LASNEX team and the LASNEX code, Leo is regarded as one of the best in the group." (Ex. 1, p. 107).

Two of the five members of the X-1 management team who conducted the RIF evaluation and who contributed to the narrative, Mead and Charles Wingate, were also members of the HF committee chaired by Dr. Canavan. Although they concurred in the committee's report they were opposed to funding the proposed HF laser (See Ex. 1, pp. 209-210). Group leader Wilson testified that they were the source of the comments in the narrative about Dr. Mascheroni's gross conceptual and technical errors and inadequate knowledge of the proper use of computational tools and that they based those comments on his presentation to that committee. Wingate, who was in England at the time of the hearing, did not testify but Wilson reported that Wingate believed that Dr. Mascheroni had perpetrated a swindle on the committee: The LASNEX run he presented to the committee either mis-represented the energy delivered the target or was the result of a gross conceptual error

because the shape of the HF laser was such that almost half of the energy delivered to the target could not be used (2 Tr. 653-657). Dr. Mascheroni vigorously disputed the accuracy of this assertion (2 Tr. 1148-1152).

Mead testified to a number of what he termed gross conceptual and technical errors primarily in the presentation to the HF Committee (2 Tr. 827-836). One of these Dr. Mascheroni characterized as a typographical error (2 Tr. 1133). He vigorously disputed the others (2 Tr. 1135-1142). I am in no position to decide who is right but I need not. The HF Committee and its conclusions have already been described.

Other than Mead and Wilson the Laboratory offered only one witness who testified as to Dr. Mascheroni's technical competence: Dr. David Forslund. Forslund is a Fellow of the Laboratory and has been involved in the IC effort at the Laboratory since 1972. He is the Laboratory's premier expert on the WAVE code. He had extensive interaction and some disagreement with Dr. Mascheroni. He testified that Mascheroni was a competent physicist and he refused to characterize Mascheroni's work as showing an inadequate knowledge of how to use the codes. (2 Tr. pp. 1024, 1028, 1041.) His disagreement with Dr. Mascheroni related to what Forslund described as a lack of communication. Mascheroni, in Forslund's view, did not make explicit the assumptions implicit in his conclusions and, indeed, asserted as conclusions what were really assumptions. They were not, in Forslund's view, necessarily wrong. They were simply unexplained. More work and documentation was needed to establish the power laws which would have to be applied to place Dr. Mascheroni's extrapolations from the

WAVE code into LASNEX on a firm foundation. Forslund urged Mascheroni to write up his work in a paper, making clear his assumptions and equations, and submit it for publication in a refereed journal so that others could examine and comment on it. Mascheroni's response was that he intended to do so but did not have time. (Mascheroni testified at the hearing that subsequent to his RIF he had in fact submitted a paper to the journal Forslund had suggested Physics Affluence. There is no evidence that it has been accepted for publication.)

The narrative, under the heading of skills, knowledge and experience, charged Dr. Mascheroni with "slow learning" and under the heading of job performance and achievement stated that when informal reports were produced "the material was seriously flawed in both concept and detail." This, again, reflected the scientific disagreement between Wilson and Mead and Dr. Mascheroni. Insofar as it reflected on the competence of Dr. Mascheroni as a scientist it was contradicted not only by those already quoted but by Dr. Hirons and Dr. Canavan. In a letter written to Browne after the RIF notice (Ex. 6) Hirons said "I really believe that Leo is an extremely bright and innovative physicist who could make significant contributions to the Laboratory's mission if he is properly directed and supervised." Dr. Canavan, to whose committee the alleged gross conceptual and technical errors were submitted, testified that he had known Dr. Mascheroni since 1981 and was acquainted with his work in the same way that he was acquainted with the work of hundreds of others. He was asked whether he could rate Dr. Mascheroni comparatively with those others and said that he could do so. His testimony is worth quoting verbatim:

THE HEARING OFFICER: All right. How would then, how would you rate Dr. Mascheroni among those hundreds?

THE WITNESS: Could I rate him on two scales?

THE HEARING OFFICER: Sure, as many scales as you want.

THE WITNESS: There are two very different, well, there are two very different criteria for rating. One is just, you know, sheer technical brilliance or really demonstrated ability to work problems through, and things like that. The other scale is the -- excuse me -- the ability to, ability to see sort of a program opportunity, a chance to do something, and the chance, and the, and the sort of determination to see that through to something. They're two very different scales, and people generally fall into one of those boxes or the other. If you look at people in the Laboratory, they're either all of one or all of the other. I think Dr. Mascheroni is interesting because he's sort of a combination. He does technical stuff, which, which he does reasonably well, and he does some, he has some program insights which are quite good, and he's very determined, so I would have to say that on the basis of the five years of interaction, and then few months of intense discussion, that on the technical basis all I could say is that he did pretty well, average, a little bit above average, something like that. I think on the latter scale, which is the, his abilities to put something together and then stick with it, his, I -- I think that he showed a lot of insight there. He was, he did -- he did a clever synthesis of a lot of complicated things to come up with his argument, and of course, his, I think his determination in trying to pursue it was just unparalleled. (1 Tr. 886-887)

Dr. Canavan further testified that Dr. Mascheroni had

good ideas. He acknowledged that "some of them had to get battered around and fixed a little bit, but, by and large, they held up okay." (1 Tr. 887)

Perhaps the best explanation for the derogatory statements in the RIF narrative was given by Dr. Mead. He testified that the narrative was not meant to be an overall job recommendation or an overall assessment of all of Dr. Mascheroni's work. It was, rather, meant to be an internal document from X-1 to upper management to lay out the reasons for the RIF recommendation (2 Tr. 868.) In blunter terms, X-1 management had decided that if its staff had to be reduced, Mascheroni was the one that had to go and the narrative was composed to ensure that result would be accomplished.

In some respects the narrative was completely accurate. The HF laser as a Laboratory microfusion source was not currently funded and, hence, was not "programmatic," although it was also clear from the testimony that scientists at the Laboratory were permitted to work on projects not yet funded. It is also true, and undisputed, that Mascheroni had not published in refereed journals. It is also true, as stated in the narrative, that Mascheroni has been consistently ranked low in the performance ranking of group members at salary review time. That statement was adequately supported by the record of those reviews that were introduced in evidence (Ex. 12 and 13) and by the testimony of Joseph Kindel, the supervisor with whom Dr. Mascheroni had apparently the greatest rapport. On the first day of the hearing Kindel testified that Mascheroni was below average in Kindel's group (1 Tr. 201). When he was recalled when the hearing resumed in August Kindel flatly testified

that Mascheroni was not at the bottom but somewhere in the middle and that he was a low end performer, far below average, in short term work although he was not below average in skill and knowledge (2 Tr. 340). Finally, every witness who testified on the subject attested to Dr. Mascheroni's poor communications skills.

In perhaps the most important respect the narrative was completely accurate. The conclusion that Dr. Mascheroni is "inflexible and has little probability of successfully transferring to other work" and that "he will only work on problems that he is interested in" are amply justified by the record. His employment history, as detailed above, demonstrates this unequivocally and need not be repeated here. There is no question that Dr. Mascheroni is a dedicated and sincere scientist. Nor is there serious question as to his competence. But it is equally clear that he will not accept the judgment of his superiors in the Laboratory when they disagree with him as to the appropriateness of the work he is assigned to do. This is particularly true when his superiors are Wilson and Mead, who he believes are inferior to him as scientists. The likelihood that he would successfully transfer to other work under their direction in Group X-1 was appropriately described in the narrative as small. Even Dr. Kindel testified, in his second appearance in the hearing, that Mascheroni's "versatility and transferability in terms of skills was great, but he wanted to work on what he wanted to work on." (2 Tr. 344) As a utility man who was assigned to work on matters not of interest to him, Kindel rated Mascheroni at the low part of the group (2 Tr. 355).

Security infractions. It was claimed at the hearing that several security infractions reported by Wilson after the RIF

notice were evidence of his prejudice against Dr. Mascheroni. Those reports of infractions ultimately led in the fall of 1987 to a suspension of his security clearance pending further investigation, an investigation which was never concluded because Dr. Mascheroni was eventually terminated from the Laboratory before it was finished. Excerpts from the reports of the investigators were introduced at the hearing and those excerpts reported the opinion of some members of the Laboratory staff that the reports of infractions were motivated by a desire of Dr. Wilson to be rid of Mascheroni because Mascheroni's views as to the appropriateness of the HF laser as opposed to KrF would imperil the funding for the KrF project to which Wilson and Mead were dedicated. The question of whether Dr. Mascheroni's security clearance was properly suspended is not an issue in this proceeding. Nor will I base any conclusion upon the statements made to the OPM investigators.

Discrimination based on national origin. Dr. Mascheroni's grievance claims that his termination from X-1 was motivated by discrimination based on his national origin. Dr. Mascheroni is a native of Argentina. There was no evidence, however, that his origin had anything to do with the decision to select him as a candidate for the reduction in force. The only evidence submitted was testimony (1 Tr. 1070-1078) as to the racial and ethnic composition of the work force at the Laboratory. No connection was made, however, between that fact and the RIF.

Academic Freedom. It was also claimed that Dr. Mascheroni's RIF was a violation of the University's announced principles of academic freedom. The gist of that claim is that Dr. Mascheroni was RIF'd because his scientific

views differed from those of Mead and Wilson. There is no question that there was a very sharp disagreement between Wilson and Mead, on the one hand, and Dr. Mascheroni and that disagreement strongly colored their assessment of his abilities. And there was testimony that some members of the Laboratory management were unhappy that Dr. Mascheroni had gone over the heads of his group and of Dr. Cartright, the director of the ICF program at the Laboratory, in obtaining the review of the HF proposal by the Canavan committee. There is, however, no evidence whatsoever that Wilson, Mead or Cartright attempted to prevent Dr. Mascheroni from expressing his views. Cartright did object to being charged for the expenses incurred by Dr. Mascheroni in connection with his presentation to the Canavan committee (1 Tr. 1043, 2 Tr. 1064-1065). Whether those expenses should properly be charged to Dr. Cartright's operation or to Dr. Browne, who ordered the committee investigation and report, is not a question relating to academic freedom. There is no evidence that anyone in the Laboratory objected, or would object, to Dr. Mascheroni's work on his own time in pursuing the HF laser project. The only controversy was as to who should pay for his time and whether that work was so essential to the Laboratory that he would have to be retained when there was a reduction in force in Group X-1. The claim that there was a violation of Dr. Mascheroni's academic freedom is therefore unfounded.

Concluding Findings and Recommendation

The initial presentation by the grievant in this matter, as well as the trial brief submitted by the grievant's counsel, treated this case as if it were a discharge case. It is not. Dr. Mascheroni was not discharged from the Laboratory as

incompetent. He was RIF'd. A reduction in force is fundamentally different from a discharge. An employee is discharged if he is found not to meet the requirements of his position in order that he may be replaced by another. An employee is RIF'd because fewer employees are needed and the only question is whether the choice among employees comported with the applicable standard. It need say nothing about the competence of the individual who loses his position. If, for example, the rule governing reductions in force is that they are to be accomplished in inverse order of seniority, then an individual subject to the reduction is RIF'd simply because he has less service than those who are retained. At the Los Alamos National Laboratory, I have concluded, reductions in force are not required to be in inverse order of seniority but are to be based upon the criteria set forth by the Laboratory. Whatever the governing principle the question is strictly a comparative one: Should, given the criteria established for the reduction, someone other than the grievant have been removed from his or her position? If seniority is the governing factor, was there some person with lesser seniority who was retained when the grievant was removed? If the criteria are those established by the Laboratory, rather than seniority, as I have concluded, was there someone else who should have been eliminated from Group X-1 or from X-Division rather than the grievant?

When the first session of the hearings in this matter concluded no evidence had been introduced which related in any way to the latter question and the session adjourned with the understanding that, with the exception of further testimony from Kindel and the cross-examination of Dr. Mascheroni, the grievant's case was concluded.

In a perhaps mistaken effort to communicate to the parties my thinking at that stage of the hearing I wrote a letter to both parties on August 19, 1988, which was introduced as Exhibit 23 when the hearing resumed. In that letter I expressed the tentative view that in order to recommend reinstatement I would have to find that, on the basis of the criteria established by management, someone other than Dr. Mascheroni should have been RIF'd. In response counsel for the grievant requested on September 2, 1988 that the Laboratory provide him the job ratings for three years, the complete curricula vitae, and the RIF ratings for each member of X-1 as well as the RIF narratives of the other candidates for RIF who were not terminated (Ex. 24). This was supplemented on September 8, 1988, by a request for the reduction in force memoranda submitted by each of the sub-units of X-Division to the division leader Michael Henderson (Ex. 25). The Laboratory refused to provide the requested documentation because it would be impossible to do so without violating the privacy rights of the employees involved and also because of its lack of timeliness and the fact that the grievant's case had been substantially completed at the first hearing (Ex. 26).

The matter was fully canvassed when the hearings resumed on September 24, 1988. Counsel for Dr. Mascheroni vigorously disputed the tentative view set forth in my letter and asserted his basic contention that "If we've established that the statements in the reduction-in-force memorandum are not sustained by the facts, that Dr. Mascheroni should be reinstated with back pay." (2 Tr. 6). Without waiving that position counsel then named seven persons in Group X-1 who were claimed should have been RIF'd rather than Dr. Mascheroni: Barnes, Elliot, Gitomer, Goldstein, Magelssen,

Stover, and, finally, Dr. Wilson (2 Tr. 14, 42). Counsel for the Laboratory refused to provide the requested information with respect to them unless some prima facie case was made that they were potential RIF candidates. (2 Tr. 16-17).

The matter was revisited on the second day of the resumed hearing when Dr. Kindel resumed his testimony. Kindel's rankings of the personnel in X-1 for salary review for fiscal 1985 and for fiscal 1986 had previously been introduced in evidence with all of the names other than Dr. Mascheroni's eliminated (Ex. 12 and 13). On the first Dr. Mascheroni was listed as 20th out of 26. on the second he was listed as 27th out of 29. Accepting this as a prima facie showing of those with whom Dr. Mascheroni could be compared, an effort was made to obtain the names of those persons below Dr. Mascheroni on these lists. It failed. The Laboratory refused to release the names on grounds of privacy (2 Tr. 467). Dr. Kindel, however, had a list with the names, all of whom he knew, and was asked, without identification, a number of questions with respect to them over counsel's objection that he could not reasonably cross examine without knowing the names of the persons involved. In accordance with my then view, which I have substantially changed as will be indicated below, I asked Dr. Kindel whether, in applying the Laboratory's criteria for the RIF, a reasonable unbiased person would have picked Dr. Mascheroni for the reduction in force. His answer was "yes." (2 Tr. 486-488). A reasonably unbiased person, Dr. Kindel testified, could have picked Dr. Mascheroni. He was then asked the same question with respect to the restated criteria used by the management of Group X-1. Dr. Kindel volunteered that in terms of the criterion of versatility and transferability Dr. Mascheroni would be the least flexible in the entire group (2 Tr. 489-

490). He explained that in terms of skill Dr. Mascheroni's level was very high but as a matter of his choice of doing work he was the least flexible. On the other criteria, he thought it was pretty much of a toss-up.

This brings me to my final conclusion with respect to the RIF. In my letter of August 19, 1988, I expressed the view that since I am not a scientist and therefore am in no position to judge the validity of the scientific positions of either side, I could find that the elimination of Dr. Mascheroni from Group X-1 could be set aside only if I could make a determination that it was so overwhelmingly clear that someone other than Dr. Mascheroni should have been RIF'd that no expertise was required to come to that conclusion. Upon review of the record and the exhibits I have come to a somewhat different conclusion. Under the criteria established by the Laboratory for determining who should be RIF'd the primary consideration, as stated in the Jackson memorandum was that "you need to retain the most valuable and versatile people, those who contribute the most to the program effort that will remain after the reduction." If, as was clearly the case here, the elimination of an employee would not have a significant impact on the program determined upon by management then the primary characteristic was versatility, the ability to transfer skills to the operations determined by management. The precise question to be decided in this proceeding is whether Dr. Mascheroni was improperly selected for the reduction under those criteria.

To put the matter in terms of the relief requested, one question to be decided in this proceeding is whether Dr. Mascheroni should be restored to his position in Group X-1 under group leader Wilson. Dr. Mascheroni was not

terminated from the Laboratory -- he was terminated from X-1 and given a position in Division N under Dr. Hirons. In order to answer the question of whether that action should be set aside it is not necessary to evaluate the relative scientific skills of Dr. Mascheroni and others in group X-1, or for that matter in Division X. Dr. Kindel was the most sympathetic of those under whom Dr. Mascheroni had worked in his more recent years at the Laboratory. On examination by Mascheroni's counsel he qualified his testimony about versatility and flexibility: if he had told Dr. Mascheroni to work on something he was not interested in it would be possible that Dr. Mascheroni would do it (2 Tr. 513, 530). On re-cross examination, however, he was positive that this would not be the case with Dr. Wilson as group leader (2 Tr. -544). Indeed, it is apparent from Dr. Mascheroni's supplemental grievance that working under Wilson's direction was not his objective. in it he asked reinstatement to a position in his field of expertise equivalent to that which he held in X-1 prior to his RIF in which he could continue his work on the microsource.

Dr. Mascheroni, it is clear from the testimony, is a dedicated and sincere scientist who believes that the management of the Laboratory is pursuing an erroneous course in seeking to achieve inertial confinement fusion. He believes that his conception of an HF laser is the correct course and that KrF is doomed to failure. In a sense he is too dedicated. He is so convinced of the correctness of his views that he is unwilling to accept management's direction to devote himself to research that he believes is wrongly directed. His attitude was perhaps best expressed at the hearing when he suggested that the Laboratory was no longer a scientific laboratory but should be renamed the "Los Alamos

Management Laboratory." (1 Tr. 909).

Dr. Mascheroni's views about the relative merits of HF and KrF may, perhaps, be correct. But that is not the question before me. Nor is the question really one of comparative scientific capacity or ability. The question before me is whether management acted improperly in determining to eliminate Dr. Mascheroni rather than someone else from Group X-1 on the basis of the evidence as to whether he would be as useful as others in the activities of Group X-1 directed in a way with which Dr. Mascheroni disagreed by those with whom he profoundly disagreed.

The conclusion must be that, on the evidence introduced, there was no showing that management's decision on that question was improper. Dr. Mascheroni could be given that which he desires only if there were a change in management's decision as to the kind of research to be performed; he could be restored to useful work in Group X-1 only if there were a change in the leadership of the group. Dr. Mascheroni expressed, in no uncertain terms, both in the documents annexed to his grievance and in his testimony, his contempt for the scientific capabilities of the group leader of Group X-1 and its deputy group leader, Dr. Mead. To anticipate that he would be able to perform satisfactorily under their direction on projects which do not interest him would require a leap of faith unwarranted by any testimony in the record.

There remains the contention that, even if this is so, his RIF from Group X-1 should be set aside because of the false statements contained in the RIF narrative which are alleged to have been inspired by the fear of Wilson and Mead

that Dr. Mascheroni's ideas would lead to the elimination of their positions or a reduction in their funding. I have already concluded that some of the statements in the narrative are, indeed, false. If the placement of Dr. Mascheroni on the RIF list for Division X were based solely on the narrative and if the false statements in the narrative were critical to that placement there would be force in counsel's contention that the false statements should, without more, be the basis for granting Dr. Mascheroni's grievance. The facts, however, are to the contrary. First, the decision to place Dr. Mascheroni first on the list of RIF candidates from Group X-1 was made before the narrative was composed. The narrative was written in order to create the maximum likelihood that if anyone was to be eliminated from Group X-1, Mascheroni would be it. Second, the false statements in the RIF narrative did not go to the primary characteristic determinative of the RIF decision: Transferability of skills and, secondarily, programmatic effect. Third, Dr. Henderson who had the ultimate responsibility for compiling the list of RIF candidates for Division X did not rely exclusively upon the narrative in placing Dr. Mascheroni as number 6 on the Division RIF list. He discussed each of the candidates submitted by the group leaders with them. Henderson's understanding of the criteria to be applied was that all other things being equal he was to select people who had "the least flexibility, the least adaptability and willingness to work on things different from those they were working on." (1 Tr. 423) In addition he had independent knowledge of Dr. Mascheroni's versatility and transferability. Henderson had been group leader in X-5 before becoming division leader. At that time Dr. Mascheroni had come to him because he was unhappy in X-1 and was looking for a move. Henderson did not offer him employment because Dr. Mascheroni insisted on deciding what his job assignment

would be. Henderson thought that it was his own prerogative to determine the job assignment. (I Tr. 458-459)

Even if the false statements in the RIF narrative were not critical to the RIF decision it is contended that they are evidence of the fact that the decision to eliminate Dr. Mascheroni from Group X-1 was motivated by bias, prejudice and self-interest in that if Dr. Mascheroni's proposal for an HF laser were successful funding would be eliminated or reduced for the KrF program to which Wilson, Mead and Cartright, the program director for ICF, were dedicated. I cannot so find. It is certainly true that there was intense scientific disagreement between those three and Dr. Mascheroni. Cartright, as ICF program director, was firmly committed to KrF. Mead was hired at the Laboratory because of his work on KrF. It is undoubtedly true that if Dr. Mascheroni were successful in persuading Laboratory management that HF, rather than KrF, should be pursued there would have been an impact on at least Mead's funding. But it is not true that the Laboratory's decision as to whether to pursue KrF or HF would be determined, or even influenced, by Dr. Mascheroni's RIF or the statements made in the narrative.

As of the date of the RIF the Canavan Committee had received Dr. Mascheroni's input and was prepared to issue its report. The ultimate decision as to its funding was to be made by Dr. Browne. He had been fully apprised, in writing, of Dr. Mascheroni's views on the subject and he would be the recipient of the Canavan Committee report. Whether Dr. Mascheroni was on the payroll of X Division rather than N Division would have no effect on the decision and there is no reason to believe that anything said or done in connection with the RIF would have influenced it.

It was also suggested at the hearing that although Dr. Mascheroni was not discharged his elimination from Group X-1 and employment in Division N constituted a "constructive discharge." (2 Tr. 425). It is undoubtedly true that under certain circumstances a transfer, even without loss of pay, could be said to constitute a constructive discharge. As I put it at the hearing, if a female carpenter were displaced for discriminatory reasons it would not be a defense to her claim for reinstatement as a carpenter that she was given the job of sweeping the floor at the same pay (2 Tr. 471-473). That could indeed be said to be constructive discharge. To conclude that what was essentially a transfer from Division X to Division N in this case constituted a constructive discharge, however, would require that I find that the work to which Dr. Mascheroni was assigned in Division N under Dr. Hirons was not scientific work commensurate with his skills and competence. No evidence was offered with respect to that question and I cannot therefore conclude that Dr. Mascheroni was constructively discharged. It is probably true that in Division N Dr. Mascheroni was not assigned to do work in support of his HF proposal but that, I have concluded, is management's decision to make.

I have concluded for these reasons that Dr. Mascheroni's grievance insofar as it requests his reinstatement to Group X-1 should be denied. This is not to say, however, that Dr. Mascheroni is not entitled to some relief. The first request in his grievance was that "all of the RIF related memos" be deleted from his personnel records. Indeed, counsel for the Laboratories suggested at the hearing that the RIF narrative could be expunged (2 Tr. 472). Since I have found that it contains erroneous derogatory statements about Dr. Mascheroni's competence, I believe that the grievance

should be granted in this respect. Technically the performance appraisal for Dr. Mascheroni for the 1986-1987 period contained in the record at pp. 137-139 of Exhibit 1 is not properly before me. It does, however, repeat in some part the statements made in the RIF narrative and I believe that it too should be deleted, although I have no jurisdiction so to recommend.

Finally, although I reject any claim for back pay for the reasons already stated, I believe and recommend that Dr. Mascheroni is entitled to some reimbursement of costs. Much of this controversy was generated by the statements in the RIF narrative about Dr. Mascheroni's competence and work performance, statements that I have concluded were false. In this respect he has succeeded. That success, however, has not been without cost.

The Laboratory's Administrative Manual provides in AM 111.16 that the Hearing Officer's fees shall be paid equally by the Laboratory and the employee unless the Director substantially rejects the recommendation of the Hearing Officer. This provision contains an inherent potential for a conflict of interest: if there is any doubt as to the ability or willingness of the grievant to pay his half of the fee after the proceedings are concluded payment can be assured by the Hearing Officer if he makes a recommendation that he believes the Director will not substantially accept. For this reason I required the Laboratory and the grievant each to pay, in advance, $1950 before the first hearing session and $1950 before the second, computed on the assumption that a minimum of two days would be required-for study and preparation of this report after the hearing, with any additional time to be billed later. Given my conclusion as to

the RIF narrative and associated documents, I believe, and will recommend, that Dr. Mascheroni be reimbursed for his share of those costs. Further, I am uncertain as to what the financial arrangements were as to the cost of the transcript. It has been invaluable in enabling me to prepare this report and recommendation. If Dr. Mascheroni paid the costs of the transcript, or any part thereof, I will recommend that he similarly be reimbursed.

As stated the fees which I required be paid in advance were based on the assumption that two days of study and preparation time would be required for the preparation of this report and recommendation. That assumption proved to be false. As must be obvious it required many weeks of effort to review the record, identify the issues and make findings of fact. I was advised by counsel for Dr. Mascheroni on August 15, 1989 that he "has run out of funds to pay his one-half share of your charges." If the recommendation that the Laboratory reimburse him for his half of my fees were applied to the additional billing for the preparation of this report it would create at least the appearance that in making such a recommendation I was motivated by the certainty that, in its absence, I would not be paid for the additional time that has proved to be required. Accordingly I have determined not to submit any bill for that additional time.

RECOMMENDATIONS

On the basis of the foregoing report, I recommend to the Director that:

1. Dr. Mascheroni's grievance, both as originally

stated and as amended by counsel, should be denied in its entirety except as specified below.

2. The RIF narrative from Group X-1 management dated January 26, 1987 and the supplementary narrative from Doug Wilson dated February 23, 1987 relating to Dr. Mascheroni and Dr. Henderson's narrative relating to him dated January 27, 1987 (Exhibit 1, pp. 127, 130) should be removed from Dr. Mascheroni's personnel file and all other Laboratory files with the notation that they were removed at the direction of the Director pursuant to a Hearing Officer's recommendation.

3. The Laboratory should reimburse Dr. Mascheroni for all fees previously paid by him to the hearing officer and all costs actually incurred by him for the preparation of the transcript. (This does not include attorney's fees.)

Respectfully submitted

David E. Feller, Hearing Officer

November 19, 1990